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ABSTRACT

In this litigation, parents of elementary school students in Lynn, Massachusetts, challenge their city's school assignment plan, the Lynn Plan, because it takes race into account in permitting children to transfer from their neighborhood schools to other schools within the district. Since implementation of the Lynn Plan entitles the Lynn Public Schools to certain additional aid from the Commonwealth of Massachusetts under the state's Racial Imbalance Act, the plaintiffs also challenge the state law on its face and as applied in this case. Both the Lynn Plan and the state laws under which it was enacted, they say, violate the Constitutions of the United States and Massachusetts, as well as various federal civil rights statutes. They petition the Court to invalidate the Lynn Plan and enjoin the defendants from employing racial classifications in student assignments and in the distribution of state aid. The Court dismisses the plaintiffs' claims and enters judgment in favor of the defendants. It concludes that nothing in the constitutional or statutory law of the United States or the Commonwealth of Massachusetts mandates dismantling of the Lynn Plan and thus undermining defendants' efforts to run a thriving, multiracial, and successful school system. (SM)

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SAMANTHA J. COMFORT, on)
behalf of her minor child and)
friend, ELIZABETH NEUMYER,)
et al.,)
Plaintiffs,)
)
v.) C.A. No. 99-11811-NG
)
LYNN SCHOOL COMMITTEE, et al.,)
Defendants,)
and,)
)
COMMONWEALTH OF MASSACHUSETTS,)
Defendant-Intervenor.)

TODD BOLLEN, et al.,)
Plaintiffs,)
)
v.) C.A. No. 01-10365-NG
)
LYNN SCHOOL COMMITTEE, et al.,)
Defendants.)

GERTNER, D.J.:

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June 6, 2003

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UNITED STATES DISTRICT COURT
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SAMANTHA J. COMFORT, on behalf of her minor child and friend, ELIZABETH NEUMYER, et al.,
Plaintiffs,

v.

LYNN SCHOOL COMMITTEE, et al.,
Defendants,

and,

COMMONWEALTH OF MASSACHUSETTS,
Defendant-Intervenor.

C.A. No. 99-11811-NG

TODD BOLLEN, et al.,
Plaintiffs,

v.

LYNN SCHOOL COMMITTEE, et al.,
Defendants.

Civil Action No. 01-10365-NG

GERTNER, D.J.:

MEMORANDUM AND ORDER

June 6, 2003

I. INTRODUCTION

The issues raised in this litigation are critically important, not just for the parties, but for the nation. This case and others like it around the country require courts to grapple with whether and how public school officials may implement race-conscious programs in order to fulfill the Constitution's promise of the Equal Protection of the laws, a promise articulated with special force fifty years ago in Brown v. Board of Education, 347 U.S. 483 (1954).

Plaintiffs, parents of elementary school children in Lynn, Massachusetts, challenge their city's school assignment plan (the "Lynn Plan")[1] because it takes race into account in permitting children to transfer from their neighborhood schools to other schools within the district.[2] Since the implementation of the Lynn Plan entitles the Lynn Public Schools to certain additional aid from the Commonwealth of Massachusetts under the state's Racial Imbalance Act ("RIA"),[3] the plaintiffs also challenge the state law on its face and as applied in this case. Both the Lynn Plan and the state laws under which it was enacted, they say, violate the Constitutions of the United States and Massachusetts, as well as various federal civil rights statutes. They petition the Court to invalidate the Lynn Plan and to enjoin the defendants from employing racial classifications in student assignments and in the distribution of state aid. For the reasons set forth below, I **DISMISS** plaintiffs' claims and enter **JUDGMENT** in favor of the defendants.

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[1] The Plan, which incorporates other reforms not at issue in this case, is known officially as "A Voluntary Plan for School Improvement and the Elimination of Racial Isolation."

[2] The Lynn Public Schools comprise a single school district. That district is further divided into attendance zones also referred to as districts. Students are assigned to their "district" schools but may also request transfers to "out-of-district" schools. The term "out-of-district" school is misleading as these schools are still within the same school district. For the sake of clarity, I will refer to "district" schools as "neighborhood schools" and "out-of-district" schools as "non-neighborhood schools."

[3] Mass. Gen. Laws c. 71 §§ 37C, 37D and c. 15 §§ 1I, 1J, 1K.

To the plaintiffs, the issues could not be simpler: Taking race into account in school transfers violates the Equal Protection Clause. They contend that it sends the wrong message to the children of Lynn, namely, that their race matters when, in fact, the Constitution requires color blindness. Plaintiffs concede that reducing racial isolation and educating students to be citizens in a multiracial nation are important goals. They also concede that Lynn has accomplished those goals and has vastly improved its schools since the Plan's implementation. But they claim that neither these goals nor this record are sufficiently compelling under the Constitution to justify Lynn's race-conscious school transfer policy.

To the defendants, the Lynn Plan not only complies with the Equal Protection Clause but is critical to maintaining that compliance. The Plan seeks to encourage learning and good citizenship in a racially diverse environment. The message it conveys to the students is that our society is heterogeneous, that racial harmony matters -- a message that cannot be conveyed meaningfully in segregated schools. In order to teach that the "content of [one's] character"[4] does not depend on color, a child must interact with children of other races, an interaction that necessarily challenges nascent stereotypes. Without meaningful social contact, talk of tolerance and cooperation is nothing but an abstraction. If the Lynn school transfer plan were eliminated, the elementary schools of Lynn would become more and more racially segregated, with a host of pernicious consequences.

While there has been a rising tide of litigation challenging the government's use of racial preferences, both in and outside of the educational context, and while courts increasingly treat such programs with suspicion, it is not established -- as the plaintiffs, not to mention many in the media, contend -- that any government use of race for the purpose of promoting diversity is unconstitutional. The answer to the question "Can schools constitutionally use race in furtherance of education in a multiracial society?" is and has always been "It depends." It depends upon the setting -- for example, K-12 education,[5] in contrast to higher education or employment, raises very different issues requiring distinct legal analysis. And it depends upon the nature of the plan -- its purposes, its flexibility, the level of coercion involved, its history, its administration.

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[4] Martin Luther King, Jr., "I Have a Dream," in A Call to Conscience: Landmark Speeches of Dr. Martin Luther King Jr. 75 (2002).

[5] "K-12" means kindergarten through twelfth grade.

On both axes -- the setting and the nature of the plan -- the Lynn Plan is different from race-conscious plans that have been successfully challenged. In constitutional parlance, the Lynn Plan passes muster even under the most stringent "strict scrutiny" test: It serves "compelling" state interests and is "narrowly tailored" to achieve them.

On the setting: Unlike cases involving law schools, undergraduate degree programs, or even elite "magnet" high schools, Lynn's school transfer policies are not about admissions or rejections in a competitive environment where merit supposedly determines "winners" and "losers" in a zero-sum game. The fact that one child may transfer to a particular elementary school while another may not does not affect the quality of the educational experience for either. The parties agree that, under the Plan, all Lynn schools are not only comparable, but by 2003, equally successful.

Indeed, K-12 education involves a setting in which diversity has a different resonance than in any other. The goal of elementary education is, as the Supreme Court noted nearly fifty years ago, to foster good citizenship[6] -- not, for example, to train skilled professionals or to engage in a commercial enterprise. And in the twenty-first century, good citizenship necessarily entails the ability to function in an ever more heterogeneous democracy.

On the Plan: The Plan that Lynn officials created, and that the state authorities approved, is minimally intrusive. It uses public funds for two critical public goals -- to enable parents to choose integrated schools over segregated ones and to minimize racial imbalance across the school system. Since a racially diverse learning environment is essential for citizens-to-be, the Plan is a critical part of a comprehensive, districtwide plan to improve the quality of education for all Lynn's children.

Unlike many of the school desegregation efforts that have roiled courts and legislatures in the years since Brown, the Lynn Plan does not entail coercive assignments or forced busing; nor does it prefer one race over another. It allows every child to attend his or her neighborhood school. It also allows -- and indeed encourages -- elective transfers to schools outside the neighborhood, not to offer "choice" for its own sake, but to promote as much integration as possible while maintaining a neighborhood school system. Space permitting, transfers are approved unless they thwart the goal of reducing segregation in the city.

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[6] Brown, 347 U.S. at 493 (explaining that public education provides "the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values in preparing him for later professional training, and in helping him to adjust normally to his environment").

The history and track record of the Plan also set it apart. Before the Plan, Lynn's neighborhood schools were troubled, overcrowded, and racially segregated. City officials were accused of exacerbating these problems by allowing white students to transfer out of minority schools, but not vice versa. And even when official discrimination ended, racial divisions persisted, with documented results: Schools that were largely populated by minority students received less funding, had high teacher turnover, and had lower test scores. Throughout the system, even in the largely white schools, racial tensions and divisions persisted. White enrollment was declining at an alarming rate -- the phenomenon known as "white flight."

After experimenting with race-neutral alternatives without success, Lynn officials sought the advice of experts, including social psychologists, educators, and even demographers. They concluded that the only way to improve the schools was to implement a comprehensive program that employed not only the race-conscious transfer policy at issue here, but a host of other innovations and resource infusions. Their goal was not simply to create a diverse learning environment, but also to support it and to ensure its success through curricular changes and materials, teacher and staff training, as well as improved facilities. They created a flexible plan, based on sophisticated data collection and analysis, that changes with the conditions in Lynn. Anyone denied the placement of his or her choice can appeal, as many of the plaintiffs in this case have done.

By 2002, when the trial of this case began, it was clear that the Lynn Plan played an important part in creating a thriving, diverse, and integrated urban school system, successful on all fronts and by all measures -- where race relations are positive and racial and ethnic tensions are absent; where students from diverse backgrounds maintain friendships and are well represented in student government and extracurricular activities; where student attendance rates are uniformly high and test results reflect substantial gains, particularly in the schools located in Lynn's urban center; and where there are extraordinarily low levels of student conflict, crime, and violence.

Nothing about the plaintiffs' challenge or the government's constitutional and statutory obligations obliges the Court to dismantle this Plan.

II. PROCEDURAL HISTORY

Before me presently are two civil actions, Comfort v. Lynn School Committee, Civ. No. 99-11811, and Bollen v. Lynn School Committee, Civ. No. 01-10365.

A. The Comfort Litigation

1. Parties

Samantha J. Comfort, Rhonda Campbell, Karen Agnew, Andrew and Cattibell DiGaetano, and Jean and William O'Neil, all parents of school children enrolled in the Lynn district, brought the Comfort action in 1999. The Comfort plaintiffs sued the Lynn School Committee, its individual members,[7] the Superintendent of Lynn Schools,[8] the City of Lynn and its Mayor. In December 1999 the Commonwealth of Massachusetts intervened as a party defendant for limited purposes.[9]

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[7] The board members, sued in their official capacities, currently include Edward J. Clancy (Mayor and Chairperson), Patricia Capano, Donna M. Coppola, Arthur Fiste, John Ford, Jeffrey Newhall, and Loretta Cuffe O'Donnell.

[8] The current Lynn Superintendent, also sued in his official capacity only, is Nicholas Kostan.

[9] The Commonwealth intervened under 28 U.S.C. § 2403(b) to defend the constitutionality of the RIA. The Commonwealth expressly preserved its Eleventh Amendment defenses in its Motion to Intervene as a Party Defendant and its Answer to the Plaintiffs' First Amended Complaint.

The NAACP Legal Defense and Education Fund also moved to intervene in this proceeding. That motion was denied but the organization was permitted to participate as an amicus. The submissions of amici advance the joint interests of the NAACP Legal Defense and Educational Fund, Inc.; the Lawyers' Committee for Civil Rights Under the Law for the Boston Bar Association; Pamela Freeman on behalf of her minor child, James Freeman, a student in the Lynn public school system; Barbara and Anthony Murkison on behalf of their minor children, Tia, Cassandra, and Jason Murkison, also students in Lynn schools; and the Northshore Branch of the NAACP, on behalf of its membership.

The United States submitted an amicus brief in support of the defendants at the preliminary injunction stage of the case.

The Comfort plaintiffs challenged the RIA and the Lynn Plan under the Equal Protection Clause of the United States Constitution, Article 111 of the Massachusetts Declaration of Rights, and several federal civil rights statutes, including 42 U.S.C. §§ 1981, 1983, and 2000d. The RIA obliges the state Board of Education to address de facto segregation in Massachusetts' public schools, either by funding voluntary efforts of individual school districts to integrate or, if necessary, by compelling them to adopt plans to improve racial balance in school populations. Comfort v. Lynn School Comm., 100 F. Supp. 2d 57, 62 (D. Mass. 2000). The Lynn Plan, as I describe more fully below, entails a neighborhood school system that permits transfers to out-of-neighborhood schools, unless such transfers would result in increased "racial isolation (too low a minority percentage) or racial imbalance (too high a minority percentage)" in a particular school. Id. at 61.

2. **Preliminary Injunction**

The Comfort plaintiffs sought a preliminary injunction to enjoin the district's use of race in the Plan. I denied the motion, finding that the plaintiffs showed neither a likelihood of success on the merits nor irreparable harm. Id. at 59-60. The First Circuit in Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998), held that diversity "might be sufficiently compelling, in specific circumstances, to justify race-conscious actions." Id. at 796. The intensely fact-bound question of what educational circumstances would permit race-conscious actions was hardly amenable to resolution on the truncated record of a preliminary injunction. Comfort, 100 F. Supp. 2d at 66. Nor could the Comfort plaintiffs demonstrate irreparable harm from the continuation of the Plan since, as described below, most were content with the schools their children were in and did not intend to seek further transfers. Id. at 63-64.

The plaintiffs did not appeal the denial of their Motion for a Preliminary Injunction.

3. **Motions to Dismiss**

The defendants moved to dismiss a number of the Comfort plaintiffs' claims on the grounds that (1) the Constitution does not allow a state to be sued for damages, and (2) the plaintiffs lacked standing to sue because their children had been placed in the schools of their choice and no longer wished to transfer. With certain exceptions, I granted these motions.

I dismissed the federal statutory civil rights claims for damages against the Commonwealth on Eleventh Amendment grounds, since there was no question that the state may not be sued for damages. Comfort v. Lynn School Comm., 131 F. Supp. 2d 253, 254 (D. Mass. 2001).[10] I also held that the Eleventh Amendment barred declaratory relief against the Commonwealth. Id. at 256. See infra Section V.A.1.

In a subsequent opinion, Comfort v. Lynn School Comm., 150 F. Supp. 2d 285 (D. Mass. 2001), I held that the plaintiffs lacked standing to seek injunctive relief against any of the defendants. Id. at 288. The plaintiffs had children who were contentedly enrolled in schools of their choosing and could not "demonstrate either actual present harm or a likely danger of direct injury in the future." Id. at 295-98.

I held that the Comfort plaintiffs could pursue limited declaratory relief, as well as nominal damages. Id. at 298-99, 302. Specifically, I found that "prospective" declaratory relief was unavailable to the plaintiffs, id. at 302, but that they were nonetheless entitled to sue for a "retrospective" declaration that the Lynn Plan violated their legal rights. I now conclude that this finding was erroneous: a declaration, prospective or retrospective, is available only to plaintiffs that have standing because of a present case or controversy. See also infra Section V.A.1. In any event, the Comfort plaintiffs were free to litigate the substance of their claims for nominal damages. Comfort, 150 F. Supp. 2d at 298-99.

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[10] The Eleventh Amendment precluded plaintiffs' claims against the Commonwealth under 42 U.S.C. §§ 1981 and 1983, as Congress did not expressly abrogate the sovereign immunity of the states in enacting them. Comfort, 131 F. Supp. 2d at 255. I also dismissed the plaintiffs' claims under Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, which forbids discrimination "under any program or activity receiving Federal financial assistance," since a state itself is not a "program or activity" for Title VI purposes. Id. at 254-55.

Of the original Comfort plaintiffs, only Samantha Comfort remains in this case.[11]

B. The Bollen Litigation

Rather than amend the existing action, plaintiffs' counsel added new parent plaintiffs in a separately filed lawsuit.[12] The Bollen plaintiffs, Todd and Laurie Bollen, Janeen Goodwin, Gina Leone, LeAnne Manuel, Michael and Meta Stinson, and Karen Tsaltas[13] sued the same defendants but added claims under 42 U.S.C. §§ 1985 and 1986 and listed members of the Massachusetts State Board of Education as defendants in their official capacities. Defendants move to dismiss a number of the Bollen plaintiffs' claims on standing grounds. That motion [document

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[11] The Comfort plaintiffs amended their complaint on December 9, 1999, to eliminate Jean and William O'Neil as plaintiffs. On January 19, 2001, I allowed the motion of plaintiffs Rhonda Campbell and Andrew and Cattibell DiGaetano to voluntarily dismiss their claims. Plaintiff Karen Agnew dropped her case as well on October 30, 2001.

[12] The lawsuits were then consolidated.

[13] Sued in their official capacities, the current Board members are James A. Peyser (Chairman), Roberta R. Schaefer (Vice-Chairperson), Charles D. Baker, Patricia A. Crutchfield, William K. Irwin, Jr., and Abigail Thernstrom.

#174] is **GRANTED IN PART AND DENIED IN PART.**[14] See infra Section V.A.2.a.

III. TRIAL

The parties filed multiple summary judgment motions, all of which I denied. In June 2002, the parties presented evidence in an eleven-day bench trial.

A. Plaintiffs' Case

Consistent with their view that the case was a simple one, plaintiffs offered one live witness, Meta Stinson, a Lynn parent and plaintiff; the deposition testimony of state Board of Education member Abigail Thernstrom; and several exhibits.

Ms. Stinson, who has three daughters currently attending Lynn schools, sought to have her daughter, Angelica Jackson, transferred from Breed Middle School to Pickering Middle School. That transfer was initially denied because Stinson had listed her daughter as "white" when she first registered her for school.

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[14] The Bollen plaintiffs originally sought a preliminary injunction as well. That motion was withdrawn on April 11, 2001, after the defendants agreed to allow all of the children to attend their school of choice for the 2001-2002 school year, pending trial on the merits of their claims. Remarkably, only one of the plaintiffs, Gina Leone, took full advantage of the agreement to place her child, Troy LaMothe, into a school that was not otherwise available to her under Lynn's transfer policy.

On June 5, 2001, I granted the plaintiffs' voluntary motion to dismiss the claims of Janeen Goodwin on behalf of her child Sean. Plaintiff Michael Stinson, who sued on behalf of Angelica Jackson, noticed his voluntary dismissal on October 11, 2001.

Although Angelica's father is white, Stinson herself is of mixed racial and ethnic background -- French Canadian, Irish, Jewish, Barbadian, and African American. Upon learning of the denial, Stinson went to the Parent Information Center ("PIC") and added an additional racial designation of "black," but to no avail. Stinson conceded that although she was advised of her right to appeal, and indeed, even though that appeal would have been successful,[15] she elected not to do so. In the interim, the district announced that at the Sewell-Anderson school fifth graders could remain for the sixth grade, and Stinson was satisfied with that placement.[16]

Significantly, Stinson testified that Angelica maintains a number of interracial friendships with her classmates, has a positive attitude about race, and gets along well with students of other races, even though Stinson has not personally discussed matters of race with her daughter. Stinson conceded that it is an important component of Lynn's educational mission to ensure that its students overcome racial stereotypes and acquire a better understanding of students with different racial backgrounds.

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[15] It is undisputed that Angelica's multiracial status would have established her right to transfer to any school in the system.

[16] After Angelica transferred to Sewell-Anderson Elementary School, her sister Gabrielle was able to transfer there as well under Lynn's "sibling unification" provision.

Indeed, Stinson acknowledged that she has sought three transfers for her daughters, only one of which -- Angelica's to Pickering -- met with resistance from the PIC.

The plaintiffs also introduced the deposition testimony of Abigail Thernstrom, a member of the Massachusetts Board of Education. Thernstrom, though not offered as an expert, took issue with the views of certain school desegregation experts -- including Dr. Gary Orfield, a nationally renowned expert who testified in the defendants' case. She challenged Orfield's view that America's schools are growing increasingly racially segregated principally because she did not believe that "[t]he dividing line in America" is "between whites and nonwhites."[17] Deposition of Abigail Thernstrom ("Thernstrom Deposition"), Oct. 9, 2001, at 22.

Although a member of the Board of Education and charged with enforcing the RIA, Thernstrom opposed the Act in principle. She conceded that she could not speak with authority on the law since she lacked day-to-day familiarity with its terms.[18] Moreover, she acknowledged that she had no personal knowledge or experience of specific conditions in Lynn.

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[17] Thernstrom would later state: "I don't believe in any of these classifications, I believe in giving parents maximum choice as to where their children should go to school, and . . . none of these classifications are appropriate in my view. This kind of social engineering is not appropriate. . ." Thernstrom Deposition at 26.

[18] The RIA, she agreed, is "low on [her] personal list of priorities." Id. at 37. Indeed, when asked if the Board had conducted studies to determine whether or not the conditions that existed at the time the RIA persist today, Thernstrom replied, "My view of that would be we don't need a study, [those conditions] don't exist." Id. at 35.

Finally, plaintiffs offered exhibits that pertained to the operation of the Lynn Plan and RIA and the extent to which racial categories are used in making transfer decisions.

B. Defendants' Case

Defendants countered with ten witnesses, five of whom were district administrators and educators with twenty to thirty years' experience in the Lynn system variously as students, teachers, and administrators. Significantly, these witnesses were in a position to describe the troubled state of Lynn schools before the Lynn Plan was implemented, and to attest to its impact afterward. They described pre-Plan efforts to improve the schools, all to no avail. And they lauded the current state of the school system under the Lynn Plan and the substantial improvements it has effected. Defendants also offered the testimony of a Lynn parent and a student, who described the actual workings of the system in the schools with which they were familiar.

Finally, defendants offered the testimony of a number of nationally known experts. The experts based their testimony on their personal observations of Lynn schools, a survey of Lynn students, interviews with teachers and administrators and other Lynn-specific data. The experts affirmed the importance of Lynn's race-conscious transfer policy to the district's educational objectives.

1. The Administrators:

Janet Birchenough has been Director of Equity and Program Support for the Lynn public schools since January 1992. Birchenough managed and supervised Lynn's Parent Information Center, the school district's central registration office, which oversees the day-to-day implementation of the Lynn Plan. In addition, the PIC gathers the data that Lynn officials use to certify that the Plan remains precisely tailored to accomplish the Plan's goals -- data about the school system, its schools, its students, simulations about demographic patterns in Lynn, and the likely composition of the schools if the Plan were to be eliminated.[19] Moreover, Birchenough testified from the perspective of nearly forty years' experience in the Lynn schools -- as an art teacher working in eleven of the district's eighteen elementary schools and ultimately as an administrator. I found her testimony credible and relevant, and her knowledge of the system -- of individual schools and the history of the Plan -- encyclopedic.

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[19] Birchenough's responsibilities also include direct oversight of the district's "magnet" schools (see infra Section IV.E.6 for a description of these schools), including program design, budget, management, and other systemwide programs designed to increase the integration of the Lynn schools. In addition, she is responsible for Lynn's language support programs, including its Transitional Bilingual Education Programs; the district's assistance to homeless families; and its Title IX policies, which involve, among other things, the coordination of the district's anti-harassment policies. She co-chaired Lynn's technology plans to make certain that all schools receive the same level of technological support and equipment. She also worked with the Superintendent to develop the John Collins Writing Program, which addresses writing deficiencies identified through MCAS testing.

Patricia Barton, currently the principal of the Fecteau-Leary Middle School, also has 30 years of professional experience in the Lynn system. She testified credibly about her experience as a student attending racially isolated schools, as a teacher in a segregated system, and as an administrator who presided over that system's transformation under the Lynn Plan.

Nicholas Kostan, the current Superintendent of the Lynn School Department, also testified with considerable authority about the changes he has seen. He has been a teacher and a professional administrator in the Lynn school system for 31 years, first as a principal of the Breed Middle School. He serves as liaison between the Lynn School Committee and the Lynn School Department and at the same time oversees the PIC and works with teachers, parents, students, and the community.

Patricia Mallett is currently a teacher in the media center at the Brickett school, having taught in Lynn schools for twenty-six years. During the transition to magnet school programming, she was the system's Magnet School Facilitator. Mallett testified from that unique perspective on the race-neutral alternatives that were tried and considered, as well as the success of the current Plan.

2. **The Parents and Students:**

Karen Horner is an African American parent of two current Lynn public school students. She is active in and serves as the Acting Secretary for the Lynn branch of the NAACP. She moved from Boston to avoid living in a segregated neighborhood and to provide her children with an integrated education. Horner's children, Kyle, age 17, and Erroll, age 14, have attended neighborhood and out-of-neighborhood schools in Lynn, and she spoke movingly about the quality of her children's experiences.

Nicole Oak is a white student who had just graduated from the Lynn school system in June 2002 and described her educational experience there.

3. **Defendants' Experts:**

Dr. Gary Orfield is a nationally recognized political scientist and one of the leading national experts in the field of education and equal educational opportunity, which encompasses issues such as racial segregation, racial isolation, desegregation, housing and racial change, and their effects on students in primary, secondary, and higher education.[20] He is a professor of education and social policy at Harvard University, where he is co-director of the Harvard Project in School

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[20] Dr. Orfield has been a court-appointed expert in federal desegregation cases in St. Louis, San Francisco, and Little Rock, and a state expert in a case in Los Angeles.

Desegregation. The Project in school desegregation is an interdisciplinary research center that commissions research across the nation on issues of civil rights policy, racial change, and racial inequality. Significantly, Dr. Orfield based his testimony not only on his own research, experience, and studies from other jurisdictions but also on an extensive amount of data and information about Lynn and its public schools in particular. Orfield put the full resources of the Harvard Civil Rights Project ("Harvard Project") (a separate entity from the Project in school desegregation with a broader research focus) into his study of Lynn and gathered information firsthand during a site visit as well.

Nancy McArdle testified as an expert on the demographic and housing trends in Lynn. She was a researcher with the Joint Center for Housing Studies at Harvard for fourteen years. McArdle has researched, consulted, and published in the field of housing policy, with specific attention to demographic, population, and immigration trends. Like Dr. Orfield, McArdle relied on a wide variety of data sources specific to Lynn.

Dr. Melanie Killen, a developmental and education psychologist, testified on how racial segregation and racial diversity impact the social and moral development of children and adolescents. She is a Professor of Human Development in the

College of Education at the University of Maryland, and she presently serves as Associate Director for the Center for Children, Relationships and Culture, a research department with faculty from developmental psychology and education psychology. Dr. Killen has focused specifically on how children and adolescents evaluate exclusion based on race and ethnicity, as well as on intergroup relationships and conflict resolution across lines of ethnicity. She, too, based her expert testimony on a series of direct observations and interviews on site in the Lynn Public Schools, as well as her review of the Harvard data.[21]

Finally, Dr. John Francis Dovidio testified as a nationally renowned social psychologist with a particular interest in the subdiscipline of intergroup relations and the development of racist attitudes. Dr. Dovidio is presently the Charles A. Dana Professor of Psychology and Dean of Faculty and Provost at Colgate University. His research has focused on social psychology and race relations among elementary school children, secondary school students, adolescents, and college students. He testified about how and when stereotypes are formed and what strategies can be deployed to prevent their formation. He offered his expert opinion based on personal visits and the Harvard data.

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[21] The methodologies Dr. Killen used to evaluate the students and the school environment are the same methodologies she is using in a study funded by the National Institutes of Health.

C. Plaintiffs' Rebuttal

Plaintiffs offered one witness in rebuttal, Dr. Christine Rossell, a professor of political science at Boston University. Dr. Rossell's field of interest is the comparative efficacy of different approaches to school integration.

While Dr. Rossell had been a paid consultant to Lynn in the development of its original school desegregation plan in 1987 (when she supported an earlier, and more intrusive iteration of the Plan), at the time of her testimony, she had no current knowledge of the Plan. She based her conclusions on her research involving other school systems and what she had remembered of that early draft of the Lynn Plan from fifteen years earlier.

IV. FINDINGS OF FACT

A. The Racial Imbalance Act

In 1965, Massachusetts became the first state in the nation to enact a law addressing racial imbalance in the public schools.[22] The Racial Imbalance Act ("RIA"), Mass. St. 1965, c. 641, §§ 1 et seq. (codified at Mass. Gen. Laws c. 71 §§ 37C, 37D, and c. 15 §§ 1I, 1J, 1K), had its origin in a legislative finding that racial imbalance in Massachusetts public schools was so dramatic as to reach a crisis level, with damaging effects on the students. The Massachusetts Board of Education's "Kiernan Report" not only concluded that "[r]acial imbalance represents a serious conflict with the American creed of equal opportunity," School Comm. v. Bd. of Education, 366 Mass. 315, 318 n.5 (1974) (quoting the Kiernan Report) (internal quotation marks omitted), it also underscored the extraordinary impact of racial imbalance throughout the school system. Racial imbalance was found to encourage prejudice among students of all races, inadequately prepare students for life in multiracial communities, and produce inferior educational facilities for African Americans.[23] Id.

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[22] Dennis Ford Eagan, The Past, Present, and Future of Desegregation Law in Massachusetts, 34 Suffolk U. L. Rev. 541, 556-57 (2001).

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[23] A federal district court came to a similar conclusion in Barksdale v. Springfield School Comm., 237 F. Supp. 543 (D. Mass. 1965), which held that a racially imbalanced school denied black students equal opportunity for education. Id. at 546. The court ordered the Springfield School Committee to devise a plan to "eliminate to the fullest extent possible racial concentration in its elementary and junior high schools." Id. The First Circuit, 348 F.2d 261 (1st Cir. 1965), ultimately reversed the trial court because the School Committee had voluntarily undertaken substantially the same steps that the district court required before the case was filed, id. at 265; the First Circuit nonetheless observed that there was ample evidence to support the district court's findings:

> [R]acially imbalanced schools are not conducive to learning, that is to retention, performance, and the development of creativity. Racial concentration in his school communicates to the [African American] child that he is different and is expected to be different from white children. Therefore, even if all schools are equal in physical plant, facilities, and ability and number of teachers, and even if academic achievement were at the same level at all schools, the opportunity of [African American] children in racially concentrated schools to obtain equal educational opportunities is impaired.

Id. at 263 (quoting the district court's findings).

As a result, the legislature found that racial imbalance in state public schools posed an "emergency" situation, _see_ _School Comm. v. Bd. of Education_, 352 Mass. 693, 698 (1967), and enacted the RIA to correct it. Section 1 of the RIA provides:

> It is hereby declared the policy of the commonwealth to encourage all school committees to adopt as educational objectives the promotion of racial balance and the correction of existing racial imbalance in the public schools.

Mass. St. 1965, c. 641, § 1 (codified with amendments at Mass. Gen. Laws c. 71 § 37C). Toward this end, the RIA encourages -- _but does not require_ -- all schools to devise "plans" to promote racial balance. The only instance in which the law imposes a _duty_ upon a school committee to prepare such a plan is when the school committee has proven unable to satisfy requests from nonwhite students attending racially isolated (predominantly minority) schools to transfer to racially imbalanced (predominantly white) schools.[24] Mass. Gen. Laws. c. 71, § 37D; see also School Comm., 366 Mass. at 322-23.

The state Board of Education[25] is to assist in the development of any plan, voluntary or mandatory, and must approve it prior to implementation. Mass. Gen. Laws c. 76, § 12A. The plan must set forth in detail the district's proposed changes in school attendance zones; any possible alteration to or expansion of existing facilities, as well as any planned addition of new school buildings; and any "other measures" that the district anticipates implementing to ensure space for students seeking "desegregative transfers," i.e., transfers that will reduce racial imbalance. Mass. Gen. Laws c. 71, § 37D.[26]

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[24] The RIA defines the terms "racial imbalance," "racial balance," and "racial isolation" as follows:

> "Racial imbalance," the condition of a public school in which more than fifty percent of the pupils attending such school are non-white.
>
> "Racial balance," the condition of a public school in which more than thirty percent but not more than fifty percent of the pupils attending such school are non-white.
>
> "Racial isolation," the condition of a public school in which not more than thirty percent of the pupils attending such school are non-white.

Mass. Gen. Laws c. 71, § 37D. It is important to note that the Lynn student assignment plan at issue in this case has drafted its own definitions of these terms, as I explain below. See infra Section IV.C.

[25] The Massachusetts Board of Education supervises the larger Department of Education, of which it is a part. Mass. Gen. Laws, c. 15, § 1. The remainder of the Department is comprised of advisory councils to the Board. Id., § 1G.

Under the RIA, the Commissioner of Education has the power to withhold school construction funds and other state aid if a school district does not act within a reasonable time to reduce an identified racial imbalance in its system. Mass. Gen. Laws c. 15, § 1I, ¶ 2; see also School Comm., 366 Mass. at 323. A 1974 amendment provided affirmative financial rewards to school districts that undertake voluntary plans. Mass. St. 1974, c. 636, § 1. Such incentives included 100% state reimbursement of certain student transportation costs, substantial funding of the costs of establishing magnet schools, and payments of $500 to the district for each student transfer that reduces racial imbalance or isolation. Mass. Gen. Laws c. 15, §1I, ¶¶ 3, 4.[27] The city of Lynn submits yearly "entitlement reports" certifying the number of desegregative student transfers that occurred in its school system in the prior school year; the state responds with aid monies based on the numbers Lynn provides.

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[26] A "desegregative transfer" is defined by the Board of Education to describe any one of the following conditions:

> Students transferred from a school in which racial imbalance exists to a school in which racial isolation or racial balance exists.
>
> Students transferred from a school in which racial isolation exists to a school in which racial isolation or racial balance exists.
>
> Students attending a school other than their neighbourhood school (neighbourhood or attendance area) and are effecting racial balance.
>
> Students attending a school different from the one they would have been assigned if there were no desegregation plan, and such attendances are effecting racial balance or reducing racial isolation.
>
> Students who are assigned to a school different from the one they would have been assigned to prior to controlled choice. Such attendance contributes to racial balance.
>
> Students who are not attending their walk-zone schools and are effecting desegregative choice.

Commonwealth of Massachusetts Department of Education, "Desegregative Transfers."

From 1974 until 1984, the Act authorized state reimbursement for up to 75% of the cost of approved school renovation or construction directed at reducing racial imbalance in school populations. By 1984, the rate of reimbursement was increased to 90%, Mass. St. 1984, c. 394, § 5, where it remained until 2001, when the legislature eliminated the reimbursement, Mass. St. 2000, c. 159, § 36.[28] In Lynn's case, state assistance provided under the RIA supplied 90% of the funding for school renovations and construction that the city outlined in its 1990 voluntary plan.

B. Racial Imbalance in Lynn's Public Schools

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[27] The state deposits these payments into local "Equal Education Improvement Funds," from which the local school committees may draw monies to support the quality of education within their districts. Id. § 1I, ¶¶ 4, 5.

[28] This amendment applies prospectively and does not affect the state's existing 90% funding contributions to renovation or construction efforts in voluntary plans predating the amendment.

In the nearly ten years preceding the adoption of the Lynn Plan, Lynn faced two serious problems -- substantial overcrowding of its neighborhood schools and significant levels of racial imbalance. Significantly, the state attributed the latter not only to growing residential segregation within the community, but also to the school district's own policies and practices. Indeed, correspondence during this period suggests that state officials felt Lynn's actions and inactions made the city vulnerable to state and/or federal lawsuits alleging *de jure* segregation.

The emergence of increasingly racially identifiable schools in Lynn created a crisis. A number of witnesses told of conditions not unlike those targeted in the Kiernan Report. Janet Birchenough observed racial polarization and severe resource inequalities between the predominantly minority and identifiably white schools where she taught. These inequalities were apparent on all fronts, including building facilities, learning materials, and teacher commitment. The predominantly white schools were well-maintained and well-managed; parents were deeply involved in their children's education. The minority schools, in contrast, limped along with crowded classes and outdated materials. There were discipline problems: parents and administrators alike were apathetic; students were angry, felt abandoned, and often lashed out. Attendance rates were low; achievement at all levels suffered. Class sizes were larger in identifiably minority schools than in identifiably white schools.

Wherever possible, teachers with seniority -- who had priority in choosing new openings -- transferred out of minority schools into the identifiably white, wealthier schools, where the school climate was more conducive to learning and teaching. There was no professional training for teachers to prepare them for teaching a diverse student population, and little or no curricular support.

Birchenough observed that the racially charged and intolerant atmosphere in the schools led to cross-racial conflict, the students' frequent resort to racial slurs, as well as tendencies to self-segregate by race at recess and in cafeterias and classrooms. This was so in all of Lynn's schools, in the better-off, predominantly white schools that harbored small minority populations as well as in the more racially mixed schools. Birchenough's observations were confirmed by other participants, including Principal Barton, Superintendent Kostan, and Ms. Mallett.

1. **1977: The First Warning**

In 1977, the Board of Education first confronted Lynn about the racial imbalance in its schools. Specifically, the Washington Community School ("Washington"), one of Lynn's elementary schools, was found to have a 57.2% minority student population, when the overall district was only 9% minority. The Board of Education attributed the concentration of minority students at Washington in part to residential patterns, but more significantly to the district's school assignments, which the state roundly condemned. Administrators regularly allowed minority transfers into the already racially isolated Washington Community School and assigned all bilingual classes to that school's annex.

Over the next decade the Board of Education regularly warned Lynn that its action and inaction exposed it to charges of de jure segregation. In contrast to other cities across the nation, however, by implementing its voluntary Plan, Lynn officials ultimately headed off court involvement and dramatically changed its schools for the better.

2. **1979: Washington, the First Magnet School**

In 1979 a magnet school program was established at the Washington school. The state offered supplemental funding to the Washington magnet school program, conditioned on the district's adoption of a voluntary transfer policy that would attract white students. Lynn accepted this invitation and adopted a voluntary transfer policy.

In April 1980 the district announced a more comprehensive plan. Neighborhood schools remained the centerpiece of the plan with these exceptions: White students from schools that were 70% or more white had the right to transfer to the Washington school, whereas white students already enrolled in that school would not be permitted to transfer out of it. Nonwhite students in the Washington district and elsewhere had the right to transfer to any school that was more than 70% white, but white students were not permitted to make such transfers.

Again, there was official manipulation of the policy. Officials were accused of bending the rules for white parents. Administrators regularly approved the requests of white parents to transfer their children out of predominantly minority neighborhood schools. For example, in the 1987-1988 school year 107 out-of-neighborhood white students were attending the 93% white Aborn high school as a result of transfers. Of these 107 students, more than half of them resided in the attendance zone that fed into the Ingalls high school, which was located in a minority neighborhood. Lynn officials conceded that these transfers were in blatant violation of the school assignment policy in place at the time.[29]

3. **1980s: Profound Changes in Lynn**

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[29] The Department of Education was also concerned about the closing of seven schools without taking racial balance into consideration, the loss of seven teachers trained with state funds in facilitating integration, and the increase in class size at the Washington school, well beyond the city's average, which reduced its attractiveness to transfers.

Between 1980 and 2000 racial and ethnic minorities moved into Lynn in considerable numbers, transforming a city that was 93% white to 63% white. Defense expert Nancy McArdle, citing census data, noted that the child population of Lynn went from 90% white to more than half minority during this period. More and more, Lynn's residents began to self-sort into neighborhoods by race.

The 1980 Census found that the northern and western areas of Lynn were 90% white, while a belt of moderately integrated neighborhoods surrounded a minority enclave in south central Lynn. By the end of the decade, these trends intensified.

The schools, like Lynn's neighborhoods, likewise grew more and more racially polarized. While the magnet program at Washington -- the only such program in Lynn in the early 1980s -- saw minor changes in minority concentration, dropping from well above 50% to 44% during this period, the minority share in other minority-identifiable elementary schools in Lynn dramatically increased.

The school system was troubled, with high absentee rates, racial tension and conflict, and chronically low test scores. Racial polarization in Lynn's neighborhoods and schools continued into the mid-1980s. By 1984, notwithstanding the city's demographics, then roughly 84% white and 17% minority, four of Lynn's seventeen elementary schools had minority populations of between 35% and 50%. The remaining schools were overwhelmingly white and remained so until 1987, even as the minority student population in Lynn climbed to 26% over the intervening three years.[30]

4. 1986: A Series of Failed Voluntary Plans

The state Department of Education urged Lynn to adopt a long-term, comprehensive plan to defeat racial isolation and imbalance. Lynn formulated such a plan in April 1986 but elected not to seek state approval (as the RIA requires). As a result, grant monies offered by the state for Lynn's "desegregation coordinator" were suspended mid-year, due to Lynn's stalled progress. The district ultimately drafted a second voluntary plan, which the state approved in September 1986 but Lynn never implemented.

5. 1987-1988: Greater Imbalance; More Accusations

By 1987 four elementary schools had become minority dominated, four other elementary schools were at least 95% white, and three more were hovering at around 90% white student enrollment.

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[30] In May 1984, the Department of Education confronted Lynn a second time, this time to complain of the district's failures to meet various state and federal bilingual and special education requirements. Hispanic students brought a federal civil rights suit in 1985 claiming that the district denied them appropriate language programming and educational services. Lynn ultimately submitted to the terms of a consent judgment that required it to take steps to improve its bilingual education program.

In April 1987, the Lynn School Committee developed a third voluntary plan, which the Board of Education approved. Lynn would launch and develop five schools, designated "magnet" schools, in the first year of implementation, with five more to follow in the next year. With the state's approval would come additional funds to support the necessary construction and renovation of facilities to improve these schools. The plan also approved a redrawing of elementary and junior high school attendance zones to assist with the desegregative effort.

However, certain aspects of the plan, slated for implementation in September of 1987, were delayed. The district did not implement its proposed class-size maximums, and the school year began with the elementary and middle school attendance zones unchanged.

Significantly, school officials continued to approve improper segregative transfers. By January 1988, state officials made their accusations more pointed than ever before. In a letter to Lynn's Superintendent they noted:

> It appears that the condition of minority identifiable schools in Lynn is directly [at]tributable to past actions and inactions by Lynn School officials. The most significant finding is that the School

> Committee failed to enforce its own controlled transfer policy and has admitted to that fact.

Again, the message was clear: Lynn's "actions and inactions," its failure to enforce its own plan in an evenhanded way, and its own admissions of these facts made the district vulnerable to charges of *de jure* segregation. The state withdrew its approval of Lynn's Plan.

6. 1988-1990: Drafting the Current Plan

In its February 1988 Plan, Lynn officials admitted that official actions had exacerbated racial isolation and imbalance. They redoubled their efforts, this time soliciting feedback from the community, which -- no doubt because of Lynn's history -- eyed Lynn's proposed actions warily. A letter from Christine Rossell -- who consulted for Lynn during this period but now serves as the *plaintiffs'* expert in this case -- was more sanguine, observing that Lynn stood "an excellent chance of desegregating its six minority schools and minority isolated schools."

A key point of contention was student assignment. The state Department of Education was concerned that Lynn's use of voluntary transfers and magnet programs would not be sufficient to reverse the decades-long trends toward racial imbalance, a trend exacerbated by official action.[31] Lynn, however, remained committed to a voluntary transfer plan and refused to assent to "restricted choice" or "controlled choice" regimes that the Department was recommending.

Finally, in September 1989, Lynn devised yet another amended plan, which the state accepted. This new Plan, the terms of which I will set forth in detail below, guaranteed that every student could attend his or her neighborhood school. In addition, a student could transfer from the neighborhood school to another school as long as the transfer improved the racial balance in either the neighborhood or the destination school. The Plan gave assurances that there would be space for such transfers in new and renovated schools.

In February 1990 the Plan was amended to allow for "neutral transfers," that is, transfers that would neither improve nor adversely affect racial balance in the schools that were party to the transfer. The state approved this amendment.

A 1999 amendment to the Plan added more flexibility to the transfer system, instituting an appeals process for transfer denials and certain exemptions for bi- and multiracial students[32] and cases of extreme hardship.[33] This Plan is the one that the plaintiffs challenge.

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[31] At one point, Lynn proposed a plan that would gerrymander the Ingalls and Aborn neighborhoods to make them even more imbalanced. Lynn proposed to redistrict the Ingalls school zone by annexing the white section of the Ingalls school zone, which was 53% minority, into the Aborn zone, which was overwhelmingly white.

C. **The Current Plan**

It is important to note at the outset that under the Lynn Plan every student in Lynn is entitled to attend the school in his or her neighborhood.[34] Students have options beyond their neighborhood schools if their proposed transfers are "desegregative" -- i.e., when they contribute to the districtwide integration effort. Additional "neutral transfers" are allowable as well, provided that they are approved by the school district's PIC and the sending and receiving principals.[35]

Whether or not a transfer is desegregative or neutral turns on the interplay of three factors: the racial composition of the sending and receiving schools and the student's race. Schools are classified as either "racially balanced," "racially isolated," or "racially imbalanced." An elementary school is considered

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[32] As noted above, this requirement means that Angelica Jackson, daughter of plaintiff Stinson, would have been able to transfer freely out of her neighborhood school to any other school in Lynn.

[33] See infra Section V.A.2.

[34] The Lynn Plan does not apply to school assignments for students participating in bilingual or special education programs.

[35] Neutral transfers at the middle and high school level are available until August 1. Elementary school students may participate in neutral transfers until December 1 -- or later, if the principals of the sending and receiving schools give their assent.

"racially balanced" if its minority[36] population falls within +/- 15% of the overall percentage of minority students in the Lynn district.[37] For the middle and high schools racial balance is +/- 10% of the district population. When the proportion of minority students in a school exceeds the range of racial balance, that school is classified as "racially imbalanced." Likewise, a school in which the number of white students surpasses the outer bounds of racial balance is "racially isolated."

For example, Lynn's student population for the 2001-2002 school year was 42% white and 58% nonwhite. By the Lynn Plan's definitions, then, an elementary school that enrolled between 43% and 73% minority students would qualify as racially balanced. Middle and high schools required a tighter fit of between 48% and 68% minority students. Elementary schools with more than 73% minority students in the 2001-2002 school year -- and middle or high schools with more than 68% minority students -- were designated as racially imbalanced. Conversely, an elementary school that was fewer than 43% minority or a middle or high school that was fewer than 48% minority would be considered "racially isolated."

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[36] The Lynn Plan's definition of minority includes African Americans, Asian Americans, Hispanics, and Native Americans.

[37] The Plan originally called for a 10% range of deviation for elementary schools, but the district altered this range to 15%, as Birchenough explained, "to allow for the window to be open a little more" and thereby permit more choice to Lynn parents with elementary school children. A 20% range was considered in 1994, but the district ultimately concluded that this "would open the window too wide," with the result that schools would lapse into greater racial identifiability.

A proposed transfer is desegregative -- always allowed, space permitting[38] -- when it would improve the racial balance of the sending or the receiving school. For example, a minority student may always transfer out of a racially imbalanced school ("School A") or into a racially isolated school ("School B"). Conversely, a white student may always transfer out of the racially isolated School B and into the racially imbalanced School A. A transfer is segregative, and never allowed, when it would exacerbate an already existing condition of racial imbalance in the sending or receiving school. A requested transfer that is neither desegregative nor segregative is "neutral" and conditionally allowable, as I explained above.

At a district level, white and nonwhite students are equally subject to the Plan; sometimes a white student may be denied a transfer, sometimes a nonwhite student. But at the individual level, there are times when, all else being equal, a student's ability to transfer turns on his or her race. To continue the above example, with School A as a racially imbalanced school and School B as a racially isolated school: A student who seeks a transfer from School A to School B may do so (again, space permitting) if he or she is a minority student. A white student requesting the same transfer, however, would not be eligible, unless she or he qualified for certain exceptions.

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[38] Factors such as limits on class size and space availability can result in denial of a transfer, but none of these are at issue in this case.

Such a student, denied a transfer because it would exacerbate racial imbalance in the system, may appeal the decision to the PIC's Director, who may occasionally refer the matter to or consult with the district Superintendent. The appeals process is not an empty formality. The district will override transfer denials on appeal when the denial would result in siblings attending different schools or when parents can make a showing of medical, safety, or other extreme hardship.

Moreover, the PIC goes out of its way to make the appeals process accessible to everyone. It assists parents in preparing documentation required to establish hardship. It then arranges a meeting with the parents to discuss the student's options. If conditions at the destination school preclude the transfer, the PIC will present the student with alternative destination schools. Finally, the unique considerations posed by bi- and multiracial students have led Lynn to amend its Plan to permit parents to appeal the district's race designations directly to the Superintendent. Significantly, a number of the plaintiffs in this case have successfully invoked the appeals process.

The Plan's drafters also recognized that integration involves more than race-conscious school assignment policies, more than simply the mixing of students of different racial backgrounds. Thus, the Plan included substantial curricular innovations designed to ensure positive racial interaction; training and development of staff to address the challenges of teaching children of diverse backgrounds; programs that would create opportunities for positive interaction among students, school personnel and parents from different racial and ethnic groups, which are not normally found within regular school programming; integrated leadership opportunities and training to give students the skills necessary to deal effectively with racial tension and conflict, etc.

In addition, the Plan's drafters acknowledged that the improvements it sought could not be sustained in the long term unless all the schools were made attractive to all Lynn parents, whatever their race. Thus, the Plan included an ambitious construction program, largely funded by the state, to ensure sufficient space for out-of-neighborhood transfers. It involved the development and standardization of curriculum so that there would be equal instructional opportunities across Lynn; development of indicators of performance and achievement for individual schools, programs and students; development of measures designed to improve school attendance; and creation of business/college partnerships with the schools to improve the quality of instruction.

D. Continuous Monitoring

The district's PIC oversees the ongoing implementation of the Lynn Plan. In effect, it is the vehicle through which the Plan administrators certify that the Plan is narrowly tailored to meet its goals.

Chief among the PIC's responsibilities is the processing of all admissions and re-admissions to the district and all transfers within the school system. It assesses students for special needs and maintains an ongoing database of each student's transfer history. That database, which features thirty-five data fields per student, enables Birchenough to monitor class size and enrollment by school, as well as the racial composition of individual schools and the district more generally.

The PIC prepares monthly reports tracking movements of students into and out of the district, as well as between the schools, to ascertain how many of these transfers qualify as desegregative. It provides regular reports to the state Department of Education on the progress and status of the district's magnet school programs, as well as the number of desegregative transfers.[39]

Significantly, the data that the PIC gathers enable it to continuously monitor the need for the Plan. The PIC tracks the patterns of Lynn residential segregation. It attempts to predict the choices of white or minority parents if there were no restrictions on transfers. Based on that data, Birchenough (and the defendants' experts) predicted that in a pure choice model, white parents would seek transfers to predominately white schools, and minority parents to minority schools.[40]

E. A Current Snapshot of the Lynn School District

1. Residential Segregation and Geographical Separation

According to McArdle's expert testimony, recent censuses and the data kept by the Lynn PIC reveal that Lynn remains geographically segregated by race. In the 1990s white populations continued to move to the northern -- and particularly northwestern -- areas of Lynn, while the concentration of racial minorities in south central Lynn expanded to consume all of southern Lynn and more of central Lynn, with a transition zone of racially mixed neighborhoods between these two enclaves. In addition, the elementary schools located in the predominantly white sections of Lynn and the elementary schools in the predominantly minority sections are separated by significant distances. The travel time between the two areas, whether by private car or public transportation, is not insubstantial.

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[39] Finally, beyond the issue of desegregation, the PIC in effect maintains a living archive of the Lynn school district. Miscellaneous data that the PIC compiles and tracks include students' post-graduation plans, reasons for discipline, enrollment diversion to private and parochial schools, and indicators of student homelessness.

[40] Segregative transfers are sought between 500 and 800 times per year. White parents disproportionately seek transfers that the Plan forbids: although only about 40% of the student population is white, 70% of the segregative transfers proposed involve white students.

2. "White Flight" and Its Decline after Implementation of the Lynn Plan

In 1979, before the Lynn Plan's implementation, when the city's schools were the most polarized, statistics show that the overall number of students in the Lynn public schools began to decline -- a direct result of the decline in white enrollment, what has been described as "white flight."

Significantly, after the Plan's implementation, this trend began to reverse. The number of students now enrolled in Lynn schools is similar to enrollment in the 1970s, just before the most significant increase in the number of minority students enrolled in the school system. While the percentage of Lynn students attending private and parochial schools rose as high as 17.4% in 1987, it has since declined dramatically to a low of 10% in 2001. Of the 15,444 students attending Lynn public schools in the 2001-2002 school year, 42% were white and 58% were nonwhite (15% African American, 29% Hispanic, and 14% Asian).

3. **Racial Balance or Imbalance**

There are presently twenty-five schools in the Lynn system -- eighteen elementary schools, four middle schools, and three high schools.[41] Under the Lynn Plan, "racially balanced" elementary schools in 2001-2002 had minority populations of between 43% and

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[41] There are eighteen elementary schools in total: Aborn, Brickett, Callahan, Cobbet, Connery, Drewicz, Fallon, Ford, Harrington, Hood, Ingalls, Lynn Woods, Sewell-Anderson, Shoemaker, Sisson, Lincoln-Thomson, Tracy and Washington Community Magnet. Of these schools, five -- Aborn, Lynn Woods, Sewell-Anderson, Shoemaker and Sisson -- are located in predominately white residential areas of Lynn, whereas Cobbet, Connery, Harrington, Ingalls, and Washington are located in predominately minority areas.

Lynn maintains four middle schools, which provide sixth, seventh, and eighth grade instruction. Barring a student's voluntary exercise of a transfer, the middle schools act as neighborhood schools in their own right, drawing students from nearby elementary schools. The Brickett, Harrington, and Ingalls elementary schools, along with portions of the Aborn, Ford, and Hood schools, feed graduating students into the Marshall middle school. The Cobbet, Connery, and Washington elementary schools feed into the Fecteau-Leary middle school. The Breed middle school draws students from the Callahan, Drewicz, Fallon, Sewell-Anderson, Lincoln-Thomson and Tracy elementary schools. Finally, the Pickering middle school receives students from Lynn Woods, Shoemaker, Sisson and portions of the Aborn, Ford, and Hood schools.

The four middle schools in turn feed into three high schools: Breed and Fecteau-Leary feed into the Lynn Classical high school, and Marshall and Pickering serve as feeder schools for the English high school. The third high school, Lynn Vocational Technical, draws from all parts of Lynn.

73%; nine schools qualified.[42] Six schools were racially isolated.[43] Four elementary schools were "racially imbalanced."[44]

Under the Plan's stricter requirements for the middle and high schools, namely, a racial makeup falling within +/- 10% of the districtwide breakdowns, which in 2001-2002 translated into 48% and 68% minority enrollment to qualify as racially balanced, only one middle school of the four was racially balanced, while all three high schools met the test. The Breed middle school (49%) was racially balanced, while the Marshall (72%) and Fecteau-Leary (81%) middle schools were racially imbalanced, and Pickering (33%) was racially isolated. Lynn's high schools were all racially balanced with the following percentages: Lynn Classical (51%), English (51%) and Lynn Vocational Technical (63%).

4. The Special Problem of Poverty

Many of the city's resident families live at or near the poverty level, a situation that greatly complicates any school's educational mission. In the 2001-2002 school year, 65% of all Lynn students received free or reduced-cost lunch (eligibility for which is based on family income), including 40.7% of white students, 72% of the African American students, and 79.8% of the Asian American students.[45] Fourteen of Lynn's eighteen elementary schools enroll a sufficient number of impoverished students to qualify for federal Title I assistance. Significantly, the four that do not receive assistance are the four most identifiably white schools.

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[42] Those schools included Lincoln-Thomson (43%), Sewell-Anderson (44%), Fallon (48%), Callahan (56%), Brickett (57%), Tracy (66%), Drewicz (68%), Washington (70%), and Ford (71%).

[43] Lynn Woods (25%), Sisson (27%), Shoemaker (30%), Aborn (35%), and Hood (just barely at 42%).

[44] Connery (80%), Ingalls (81%), Cobbet (83%), and Harrington (84%).

5. School Construction and Renovation

Since the Plan was implemented, Lynn has been able to renovate and expand six of its elementary schools, for which the state provided 90% of the funding. Lynn is currently planning another phase of construction that would include renovations to existing facilities and the construction of two new middle schools and two or three elementary schools. Elimination of Lynn's restrictions on segregative transfers would render this project ineligible for 90% funding under the RIA.

6. "Magnet" Schools

Of the ten magnet programs envisioned in early iterations of the Plan, only seven were ultimately developed. The district added two more programs in September 1999. However, the term "magnet school" in this setting needs to be clarified. It does not connote a competitive admissions process or the provision of a more elite education. See infra note 72.

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[45] Birchenough testified that at the high school level, students are often ashamed to fill out the paperwork necessary to obtain school lunch assistance, so that the numbers may under-represent the numbers of families who could qualify.

Lynn's "magnets" differ from its other schools only insofar as they have adopted certain "educational themes." The magnet themes currently include "Brickett by the Sea," "Reading and Writing Literary and Whole Language," "Technology and Language/Citizenship Skills for the Future," "Life Science," "Rainbow Connection Society," "User Friendly Society," "Pickering After School Support," and "Healthy Schools Make Healthy Communities."

While the schools offer and provide varying academic programs, which are designed to draw students from other neighborhoods elsewhere in Lynn in order to further the integration effort, the parties stipulate that "the education provided . . . in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum."

F. The Lynn Schools at Present

By all accounts, and by all measures, since the implementation of the Plan the Lynn schools have become a success story. That success was recounted in the moving testimony of the participants, in expert testimony, and in the data.

The defendants have identified certain compelling interests to justify the Plan: First, to prevent racial isolation; second, to promote racial and ethnic diversity; third, to increase educational opportunities for all students and to improve the quality of education[46]; fourth, to provide a sufficient education by state constitutional standards; fifth, to ensure the safety of Lynn's public school students; and sixth, to implement the clear command of the Supreme Court's decision in Brown v. Board of Education.

1. **Observations by Participants**

Since the Plan has been in place, Lynn school superintendent Nicholas Kostan has observed a "steady progression" of improvement in the schools. Racial tensions have subsided, attendance and test scores have increased, and suspensions of students have declined. Indeed, according to Kostan, Lynn's school attendance rates are remarkable for an urban school district. He attributed this attendance record to the Lynn Plan, which he believes has cultivated feelings of comfort and safety among Lynn students that make them want to go to school. He has also noticed that students no longer self-segregate by race in their social interactions, which he believes is also a result of the Lynn Plan.[47]

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[46] There is no question that educational achievement has increased throughout the system by all measures. For example, to the extent that the state-administered MCAS test is a barometer of academic achievement, Lynn students are performing at high levels relative to other students in the Commonwealth under similar socioeconomic conditions. Likewise, Lynn's high school students scored above average among MCAS test-takers in urban areas. In addition to the improvement reflected in MCAS test results, data collected in the first three years after the Lynn Plan was implemented show improved reading and test scores. The Massachusetts Department of Revenue, as part of its financial audit of Lynn schools, collected school achievement data from 1988 to 1996 that reflected sustained improvement in reading, language expression, and overall academic achievement.

Nevertheless, defendants do not claim that this improvement derives solely from the race-conscious aspects of the Lynn Plan. As described above, from the outset the student assignment plan has been seen as an integral part of a larger, more comprehensive educational overhaul that involves improving school facilities, increasing resources, improving curricular offerings, as well as providing a wide variety of multicultural and multiracial educational opportunities.

What the defendants do allege, and what the record establishes, is that the race-conscious and race-neutral components of the Plan are inextricably intertwined and each independently necessary. The school assignment policy, without the support of the other elements, would not have resulted in these improvements. Conversely, race-neutral strategies would not have been effective in creating a healthy multiracial learning environment without the Plan's use of race.

Patricia Mallett, a teacher at the Brickett elementary school, testified that since the Lynn Plan's implementation, she has witnessed a stunning improvement in student race relations at Brickett. Prior to the Plan, she observed self-segregation and racial tension in Brickett, a predominantly white school. Now, students of different races seek out one another and form friendships, a result she attributes to the Plan's fostering of cross-racial interaction in the crucial formative years.[48]

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[47] Nicole Oak, a seventeen-year-old white student and recent graduate of Lynn Classical High School, started her Lynn career in a "very diverse" elementary school, with the result that multiracial environments seemed "just natural" to her by the time she graduated from high school. In her experience, students from other school districts do not have the same healthy attitude toward racial difference; she suspects that hers is a result of her early exposure to students of other races.

[48] Karen Horner, an African American parent of two children in the Lynn system, testified that she did not begrudge the district's denial of two transfers she sought on behalf of her son Errol. Although the denied transfers would have made her life as a single parent substantially easier -- she preferred one school because the YMCA maintained an after-school program across the street and the other because she had recently moved into that school's neighborhood -- Horner respected the district's decisions.

2. Expert Testimony

The expert testimony in this case corroborated the moving observations of the teachers, students, and administrators who testified on behalf of the district. McArdle and Drs. Orfield, Dovidio, and Killen together gave an internally consistent, multi-disciplinary presentation that convincingly explained how essential the Lynn Plan's use of race in school assignment was to the school district's renaissance.

Broadly speaking, the expert presentation was compelling for three reasons:

First, Lynn's experts based their opinions on their considerable expertise and a tremendous amount of data -- the lion's share of it personally obtained -- specific to the conditions in Lynn. Nancy McArdle, the defendants' demographics expert, performed a comprehensive study of demographic trends in Lynn. School desegregation expert Dr. Gary Orfield put the resources of the prestigious Harvard Civil Rights Project into his study of Lynn. Dr. Orfield oversaw the administration of the Harvard Project's standard data-gathering questionnaire ("Diversity Assessment Questionnaire") to students at Lynn Classical High School. The 72-question survey, jointly designed by leading experts on school desegregation,[49] is used to compare the success of desegregation efforts nationwide. Dr. Orfield followed up his survey with a visit to Lynn Classical High School in January 2002, where he met and spoke extensively with a number of leaders of student organizations.

In January and February 2002 Dr. Dovidio visited the Lynn school system, conducted formal and informal interviews with teachers and administrators, reviewed what he called "archival evidence" -- newspapers, yearbooks, student-made decorations, school mission statements -- and observed the students in the classrooms, between classes, at lunch, and before and after school. Dr. Killen also visited the Lynn system independently of Dr. Dovidio. Dr. Killen sought out schools with a range of racial homogeneity and heterogeneity. With the students she deployed observational and interview methodologies standard in her field of social psychology. Dr. Killen then supplemented her findings with more formal interviews with teachers and administrators. Drs. Dovidio and Killen also reviewed Lynn student responses to the Harvard questionnaires.

Second, the experts looked at the data that they gathered from the distinct methodological perspectives of their fields of expertise. Dr. Orfield, a desegregation expert, considered the whole picture -- the survey data and his own observations as well as those of the other experts -- and situated Lynn's experience in his broader experience with the many school systems he had studied. Drs. Killen and Dovidio, social psychologists, viewed the data through the lens of their expertise: intergroup contact and racial stereotyping. McArdle, the demographer, analyzed data about residential and school segregation.

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[49] The survey instrument was designed by nationally recognized experts and peer-reviewed. It has been administered at locations across the country.

Third, the defense experts were nationally renowned experts who could cite with authority the studies in their field and who used accepted methodologies and based them on opinions published findings in peer-reviewed journals. I found each of them to be credible and extremely persuasive.

a. **Dr. Orfield: Desegregation Expert**

Under Dr. Orfield's supervision, the Harvard Project analyzed the survey returns and concluded that Lynn is

> a school district where all groups of students have experienced ability to work together, to share issues, to discuss across racial and ethnic lines, feel comfort -- feel that they are prepared to live and work in interracial communities, feel prepared to work under the supervision of somebody of another racial group, have worked on projects across racial

> lines in their classes, feel comfortable in discussing issues across racial lines.[50]

Dr. Orfield testified that the survey's conclusions about the Lynn experience neatly align with the underlying theory of a new area of desegregation research: that benefits accrue to all children, not just minority children, as a result of school integration. Dr. Orfield cited several peer-reviewed studies -- and referred to a number of other studies on their way to publication -- finding that parents and students in areas where integration has been achieved (as it has in Lynn) acknowledge that side-by-side learning with students of other races confers substantial citizenship benefits on all students. If schools implement desegregation programs with supportive elements, such as training of teachers, and the schools are committed to creating a positive supportive atmosphere, all students obtain "benefits to the way of thinking, understanding of the society, [and] ability to function in society," as well as gains in academic achievement across the board.[51]

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[50] The students that Dr. Orfield consulted about race relations and the nature and degree of cross-racial interaction among the students affirmed the survey results. Student responses were unequivocally positive, to such an extent that they pitied students in adjoining communities who did not have the benefit of integrated schools and regarded them as "completely clueless" about race relations.

[51] For example, data from the survey of Lynn's eleventh grade students suggest the following: students across racial lines felt that they had received information about college admissions and have been encouraged by teachers and counselors to attend college and to take honors or Advanced Placement courses, and that they have at least one teacher who takes a special

Relying in part on McArdle's demographic data, Dr. Orfield also testified that the Lynn Plan used race no more than was necessary to allow Lynn to meet its educational goal of preparing students to live in a multiracial society. He observed that the Plan's specified range of racial balance -- for elementary schools, within 15% of the overall proportions of white and nonwhite students in the district, and for middle and high schools, within 10% -- was typical of desegregation planning. In fact, Dr. Orfield found the range perhaps more flexible and accommodating to the interests of parents than he might have chosen: he said he "probably would have chosen 10%."

Finally, Dr. Orfield testified about the likely impact of the resegregation of Lynn's schools. He cited research on African American and Latino children concluding that educating students in racially isolated or segregated school environments has an adverse impact on school attendance and performance, with long-term consequences. Poverty exacerbates racial isolation and segregation for minority students. When schools that are already in areas with an overwhelming minority residential population and

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interest in them. Consistently, students across racial groups reported their convictions that teachers administer discipline fairly and that if they "try hard they can do well in school."

Students felt that integration was a fundamental characteristic of their schools. It was part of the schools' mission statement and was reflected in the conduct of authority figures.

extreme poverty resegregate, racial polarization is accelerated, with all of its deleterious effects.

Significantly, resegregation would have a substantial impact on white students in Lynn as well. Based not only on his research, but on the studies and research of other nationally known experts, Orfield opined that, as a result of racial isolation and segregation, these students forfeit the opportunity to learn from other groups and are less prepared to handle interracial settings as an adult, conclusions underscored by the testimony of Drs. Killen and Dovidio.

b. Drs. Dovidio and Killen: Social Psychologists

Drs. John Dovidio and Melanie Killen, both social psychologists, gave psychological content to Dr. Orfield's conclusions. Dr. Killen testified that because racial (and certain ethnic) differences are observable, children key on them early in their social development. Differences that are visibly apparent to young children have deeper resonance with them. As a consequence of this early attendance to observable difference, stereotypes about race and (visible) ethnicity set in early and are extremely difficult to correct in adolescence and adulthood. Dr. Dovidio agreed that children attend more readily to racial distinctions than other differences.

Furthermore, Dr. Killen testified that the setting of stereotypes is harmful to all children. Students on the receiving end of stereotypical assumptions feel stigmatized in ways that compromise their academic prospects. Students who harbor stereotypes suffer as well: their reliance on stereotypes inhibits their ability to make individualized judgments when they interact with students of other races. As a result, even students who are not themselves the objects of negative stereotypes are nonetheless impaired in their ability to live in an interracial society.

Stereotypes do not as easily take hold of children who interact early and often with children of other racial and ethnic groups. The personal connections forged between students of disparate racial backgrounds challenge race-based assumptions they might otherwise develop about one another. It is Dr. Killen's experience that children in heterogeneous environments understand better why it is wrong to judge or exclude others based on their race.

Both Drs. Killen and Dovidio testified that meaningful interracial exposure must occur early. Dr. Dovidio described racial stereotyping as a "habit of mind" that is difficult to break once it forms. It is more difficult to teach racial tolerance to college-age students; the time to do it is when the students are still young, before they are locked into racialized thinking. For her part, Dr. Killen cited studies showing that students begin to form rigid social cliques around the sixth and seventh grades, and that race can be a dominant factor that governs who joins what clique. Once students have found their cliques, the opportunity to defeat racial stereotypes with cross-racial interaction is lost.

(1) **Intergroup Contact Theory**

Drs. Killen and Dovidio both attributed the turnaround in race relations in Lynn -- and the overall preparedness of Lynn's students to live in a multiracial society -- to the district's successful implementation, through the Lynn Plan, of "intergroup contact." Intergroup contact theory is a 50-year-old prescriptive theory of race relations with volumes of support in the literature on social psychology. The theory holds that under certain conditions, interaction between students of different races promotes empathy, understanding, positive racial attitudes and the disarming of stereotypes. The four necessary conditions are (1) equal status between or among different racial groups; (2) authority support for interactions between members of the groups (that is, teachers and staff who advocate and facilitate the contact); (3) common goals and cooperative activities; and (4) opportunities for personalized contact to disrupt stereotypes.

Drs. Dovidio and Killen testified, based on their personal, independent observations, that Lynn schools amply satisfied all four of these conditions and that the positive racial climate in Lynn was directly attributable to intergroup contact. Both expressed amazement at how ideal the conditions in Lynn's schools were for learning racial tolerance and concord. Dr. Killen found that this was true of all the schools she visited in Lynn: racial environments were "uniformly positive," and she noted that "it wasn't the case that one school really stood out as being . . . seriously troubled, tough, problematic."[52]

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[52] Dr. Killen's testimony was especially telling:

> I was very struck. I was very surprised, because I went there really with no expectation. . . . And I went there just wanting to find out what it was going to be like. And I've been in numerous, numerous schools in . . . different places in the United States. And I was really surprised by the high level of positive interaction among children, among teachers and children in these schools. I mean, I was really struck by this. It was kind of astounding, especially in the informal settings, but also in the classrooms, as well. But in the informal settings, of seeing children sitting next to one another from different races, interacting together in positive ways, seeing the teachers in the hallways in terms of their warmth expressed to children and the nurturing behavior to all children, different races.
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> [O]ne of the well-documented findings is that children in cafeteria settings often self-segregate. They sit next to others who are of the same race and ethnicity, ungendered. And I did not see that . . . . It was very surprising. They elected to sit next to others from different races, different ethnic backgrounds, positive interactions, positive discourse style, positive emotional display, affect display.

(2) "Critical Mass"

Drs. Killen and Dovidio alike testified that racial balance within the schools is necessary and crucial to obtain the benefits of intergroup contact that they observed in such abundance at Lynn. Simply put, unless there is a "critical mass" of minority students in a given school, the efforts of schools to promote racial harmony lose much of their force. Such efforts are still desirable, Dr. Killen explained, but they lack significance and relevance in a school that is racially isolated or imbalanced. There is no "magical number," in Dr. Killen's experience, that indicates a critical mass, but she cited studies describing a 20% figure below which members of a racial minority in a given setting feel isolated or stigmatized. Dr. Dovidio underscored a critical mass estimate of 20% -- a number well-established in the literature and affirmed in his own research as a prerequisite to making a meaningful amount of intergroup contact possible.[53]

Dr. Killen took pains to emphasize that 20% is not a magical shut-off point for gains from intergroup contact. The gains occur along a continuum: as the racial composition of school populations creeps closer to balanced, racial stereotyping and tension is reduced and racial harmony and understanding increases.

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[53] Drs. Dovidio and Killen both summarized the research and cited specific authoritative studies on critical mass.

For example, the Fecteau-Leary middle school that Dr. Killen visited had a white population of just below 20% at the time. Dr. Killen explained that Fecteau-Leary had very recently exceeded a 20% white share and that many of the elementary schools feeding into it were racially balanced in their own right.[54]

(3) Impact of Resegregation

Both Drs. Killen and Dovidio were convinced that reversion to a de facto segregated system would forfeit the gains that Lynn has made. In fact, Dr. Dovidio noted, even when students in racially imbalanced schools receive the same instruction, skills, and training, they are "likely actually to have more racial incidents and racial problems" absent that critical mass of white or nonwhite students.

c. Nancy McArdle: Limitations Imposed by the Demographics in Lynn

Just as critical mass is a precondition to achieving the benefits of intergroup contact, the defense experts agree that the Lynn Plan's race-conscious student assignment policies are necessary to ensure that white and nonwhite populations in its schools reach that critical mass. Demographics expert Nancy McArdle projected that Lynn's predominantly white residential areas will remain so in the coming five to ten years. Predominantly minority tracts in south central Lynn will become still more racially identifiable. The minority share of the population will increase in the mixed area between south central Lynn and the white dominated northwest portion of the city. Return to a strict no-transfer neighborhood school system would bring a number of schools below critical mass. For example, a neighborhood system would take the Lynn Woods school from 24% to 8% minority, Shoemaker from 30% to 18% minority, Aborn from 34% to 12% minority, Cobbet from 80% to 85% minority, and Connery from 80% to 83%. In McArdle's assessment, if Lynn were to abandon its existing student assignment plan and return to a system of strict neighborhood school enrollment -- no transfers allowed -- the city's schools would immediately assume a high level of de facto racial segregation.

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[54] Dr. Dovidio explained further that even though schools may occasionally dip under the 20% mark, as Fecteau-Leary did, the range of racial balance in Lynn's schools does not permit a statistically meaningful study of the relative ability of the schools to teach racial tolerance. Such a study, which the plaintiffs proposed to Dr. Dovidio on cross examination, might in theory provide a measure of the contribution that student-body integration (as opposed to the other "inputs" provided for in the Plan) has made to the improvement in student attitudes about race. But because the Lynn Plan has ensured that all its schools at least hover around the 20% mark, the range of racial balance available for study is too narrow to admit of a manageable analysis.

Birchenough added that the district has considered and even tried to implement a variety of race-neutral methods to achieve the same measure of integration but rejected them all as not feasible. She testified that the present condition of residential segregation in Lynn is such that a redrawing of school attendance zones could not meaningfully alleviate the de facto segregation that a neighborhood school system would bring. The areas that would need the most attention, the racial enclaves in northwest and south central Lynn, are simply too far removed from one another. Because statistics show that white parents tend to request transfers to identifiably white schools and minority parents tend to prefer transfers to predominantly minority schools -- the district in fact denies 500 to 800 requested segregative transfers per year -- a system that allowed unfettered school choice would exacerbate segregation. See also infra Section V.B.4.b(3).

d. Plaintiffs' Rebuttal

The plaintiffs stipulate to the improvements in the Lynn school system since implementation of the Plan. Likewise, they do not dispute that Lynn meets the four conditions of intergroup contact. What the plaintiffs dispute, through their expert, Dr. Rossell, is (1) the extent to which a race-neutral plan would have accomplished the same result and (2) the extent to which a certain percentage of white or minority students is required in a school before the benefits of intergroup contact can obtain.

Dr. Rossell's testimony was not credible. As noted above, unlike defendants' experts, she did no independent investigation of the conditions in Lynn. She made sweeping conclusions without reviewing demographic or socioeconomic data and without having an accurate understanding of the Plan itself.

Her testimony was based on her experience with other systems and her memory of the Plan from her work fifteen years earlier. Significantly, her report was based on a fundamental misunderstanding of the Plan, which she characterized as a "controlled choice" plan. Lynn's Plan in fact differs considerably from controlled choice. Controlled choice authorizes the mandatory reassignment of students from one school to another in the event that parents' exercise of choice does not generate enough racial balance; likewise, controlled choice does not guarantee that students can attend their neighborhood schools.

Dr. Rossell treated Lynn's student assignment policy as a controlled choice plan based on her experience in Lynn as a paid desegregation consultant to the City in 1987. She admitted that she believed until just prior to her testimony that the Lynn Plan incorporated provisions for mandatory reassignments from neighborhood schools.

This was never the case. A draft of the Plan subsequent to the one Dr. Rossell saw in 1987 excised the provisions for mandatory reassignments, and before the Plan's implementation in 1989 the Plan guaranteed Lynn students without exception the right to attend their neighborhood schools.

In addition, Dr. Rossell's about-face on crucial issues is troubling here. She was a supporter of the Plan when she was the city's paid expert, and when the draft Plan involved provisions far more intrusive than are at issue here. In the instant litigation, retained by a different party, she testified to precisely the opposite conclusions. Specifically, in this case, she challenged the concept of a critical mass, although in her earlier work, she was on record as having embraced it.[55] While Dr. Rossell concedes that some measure of racial heterogeneity in the schools is a precondition to intergroup contact, she now takes the position that the schools in Lynn would meet that minimum, even under a neighborhood system -- a conclusion that every one of defendants' experts rejects. Indeed, she testified that there is research to suggest that racial isolation can somehow facilitate the equal status contact that is a crucial element of intergroup contact, as racial groups of equal size might be more competitive with one another.

Her testimony is unpersuasive on a number of fronts. First, Dr. Rossell does not work in the fields in which the studies cited by Dovidio and Killen were generated. She is not a social psychologist; she has no background in developmental psychology, the study of adolescent behavior, or the cognitive and social development of children.

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[55] A 1983 publication entitled Strategies for Effective Desegregation, to which Dr. Rossell made substantial contributions, declared that "A critical mass of between 15 to 20% of any particular racial group should be maintained in a school" and that "A critical mass of students seems to encourage intergroup contact, discourage self-isolation, facilitate the responsiveness of teachers and administrators to the special needs of minorities, . . . and promote more parental involvement in the school." When confronted with this work at trial, Dr. Rossell claimed that these conclusions were based on no studies whatsoever, but were pulled in effect, out of thin air.

Second, Dr. Rossell's position that there is "no research" supporting the critical mass concept is flatly contradicted by the testimony of the nationally known defense experts equipped with years of expertise in their fields, an armful of social psychology literature on both critical mass and intergroup contact, and their extensive firsthand observations of the conditions in the Lynn schools.

Third, it appears that Dr. Rossell's characterization of the field is skewed. Her insistence that there is "no research" whatsoever supporting the concept of critical mass conveyed, in essence, that she does not accept the validity of the studies cited in bulk by Drs. Dovidio and Killen -- namely, studies in social psychology. It is Dr. Rossell's position that unless the defense experts' conclusions are buttressed by statistical studies of the kind she conducts (in particular, multiple regression analyses), they are unacceptable. I am not willing to jettison the considered judgments of the entire field of social psychology and the nationally known experts within it.

Finally, taking a position diametrically opposed to Dr. Dovidio's, she stated that the experts could, for example, have surveyed schools with differing degrees of racial balance and determined the extent to which students at more balanced schools evinced healthier attitudes about race than their peers at less balanced schools. Dr. Dovidio suggested that such a study was impossible in Lynn because of the small numbers of schools that are racially imbalanced and the marginal differences among them. Moreover, Dr. Rossell testified that this "multiple regression analysis" could realistically control for race-neutral variables in the schools, including the schools' different extracurricular programs, the relative poverty level of students, the extent to which different teachers have different levels of experience in cooperative learning. But Dr. Rossell did not conduct this analysis herself. No other expert in this case believed that such a study could be done, or that it had to be done, given the weight of the scholarly literature.

Finally, Dr. Rossell catalogued race-neutral alternatives that are available to Lynn -- e.g., a transfer program that would permit any requested transfer (to a school with space) with continued use of magnet schools remaining an option. Dr. Rossell explained that Connecticut schools have created racial diversity by providing race-neutral magnet school programs. But whether the race-neutral alternatives she cited would work in Lynn was an opinion which Dr. Rossell was in no position to give -- she had not reviewed the demographics of Lynn or studied the school system in recent years, and she fundamentally misunderstood the nature of the Plan.

V. LEGAL ANALYSIS

A. Jurisdictional Issues

1. Amendments to Prior Decisions (Comfort Plaintiffs)

Federal Rule of Civil Procedure 12(h)(3) authorizes, and in fact requires, a court to raise (or, as in this case, to revisit) a jurisdictional issue sua sponte. Comfort, 150 F. Supp. 2d at 294 n.23 (citing Rule 12(h)(3)).[56] Although it does not affect the substance of the matters litigated, for clarity's sake I take this opportunity to amend certain jurisdictional findings.

This Court earlier dismissed the Comfort plaintiffs' actions for declaratory relief against the Commonwealth of Massachusetts as barred by the Eleventh Amendment. Comfort, 131 F. Supp. 2d at 256. The decision to dismiss these claims was correct, but a clarification should be made. The Eleventh Amendment precludes suit for damages only; a suit for prospective relief, including declaratory relief, is permissible when brought against state officials (but not against the state itself).[57] Mills v. Maine, 118 F. 3d 37, 54 (1st. Cir. 1997); see also Ameritech Corp. v. McCann, 297 F.3d 582, 587 (7th Cir. 2002) (finding that a declaratory judgment claim is "prospective" and therefore, under Ex Parte Young, 209 U.S. 123 (1908), not subject to the Eleventh Amendment).

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[56] Because standing is an element of the constitutional requirement of "case or controversy," U.S. Const. art. III, lack of standing deprives a court of subject-matter jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101-02 (1998).

[57] Thus, the Eleventh Amendment does not bar the Bollen plaintiffs' declaratory claims against state Board of Education members.

In a subsequent decision, I concluded that the Comfort plaintiffs lacked standing to sue the Lynn defendants for prospective relief, but I did allow them to sue for a declaration that the initial application of the Plan violated their rights. Comfort, 150 F. Supp. 2d at 302. I now find that holding was incorrect. In Berner v. Delahanty, 129 F.3d 20 (1st Cir. 1997), the court held that a claim under the Declaratory Judgment Act is not sustainable absent a showing of "actual or imminent, not conjectural or hypothetical" harm. Id. at 24 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks omitted)). If a plaintiff lacks standing for injunctive relief, he or she lacks standing to bring declaratory relief claims as well. Thus, the Comfort plaintiffs' declaratory claims against the Lynn defendants and the state defendants are dismissed in their entirety.

Ultimately these clarifications do not affect the substance of the lawsuit. With nominal damages at stake, the parties amply litigated all of the constitutional questions brought before the Court in the complaint.[58]

2. Partial Motion to Dismiss (Bollen Plaintiffs)

After the trial, defendants filed a partial motion to dismiss certain of the Bollen plaintiffs' claims on standing grounds. This motion is granted in part and denied in part.[59]

a. Claims for Injunctive and Declaratory Relief

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[58] In addition, as described below, at least one plaintiff has standing to bring all claims.

[59] The plaintiffs argue that the defendants' motion makes improper reference to trial testimony and stipulations. A jurisdictional motion, however, unlike a Rule 12(b)(6) motion to dismiss, may incorporate evidentiary materials outside the pleadings, and the court may consider arguments beyond the scope of the parties' memoranda and resolve factual disputes. Jones-Booker v. United States, 16 F. Supp. 2d 52, 58 (D. Mass. 1998).

Four of the Bollen plaintiffs, Todd and Laura Bollen,[60] Leanne Manuel,[61] and Karen Tsaltas,[62] have stipulated that they are satisfied with their existing school placements. Since it is at best speculative, and at worst unlikely, that these plaintiffs will request segregative transfers for their children in the future, they lack standing to seek an injunction.[63]

I make a similar finding with respect to plaintiff Meta Stinson.[64] Although Stinson's daughter is presently registered with the district as white, she is in fact biracial, and therefore eligible under the Plan for essentially any transfer her mother might seek.[65]

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[60] The Bollens brought suit on behalf of their son Michael, a white student, for whom they sought a transfer from his neighborhood middle school, the Marshall middle school, to the Pickering middle school. Lynn denied his request but approved Bollen's alternative request for a desegregative transfer to the Fecteau-Leary middle school. Indeed, when in the spring of 2001, consistent with an agreement in the Bollen case, the district offered Bollen an assignment to any school of his choice, Bollen elected to remain at Fecteau-Leary, where he enrolled for the 2001-2002 school year.

[61] LeAnne Manuel's daughter Shanice left her neighborhood school to attend Connery Elementary through the third grade. In September 1999, Manuel sought a second transfer, this time to the Sewell-Anderson school. Lynn denied this transfer and Manuel did not present a compelling reason for the re-assignment. When the Bollen agreement allowed Manuel her choice of schools within the school district, she initially favored Sewell-Anderson but then changed her request to the Callahan elementary school. Significantly, Shanice's ultimate transfer to Callahan was race-neutral and would have been passable under the Plan, quite apart from the Bollen agreement.

[62] Karen Tsaltas sues on behalf of her son Michael, who attended his neighborhood school, the Harrington elementary school, through the fifth grade. At the beginning of Michael's fourth grade year, Tsaltas requested a transfer to the Washington elementary school. Lynn initially denied Tsaltas' request but reversed its position on appeal. Tsaltas, however, ultimately did not transfer her son to that school, choosing instead to keep her son at Harrington.

[63] For a more extensive description of the principles of standing, see Comfort, 150 F. Supp. 2d at 285, 296-297 (citing Lujan, 504 U.S. at 564 (finding that standing cannot be predicated on a plaintiff's "one day intentions")).

[64] See supra Section III.A (setting forth the particulars of Stinson's transfer denial). Although Stinson was advised of her right to appeal this decision, she did not do so, giving her assent instead to her daughter's continued placement at Sewell-Anderson, which, though an elementary school,

Just as the Comfort plaintiffs did, the Bollen plaintiffs attempt to characterize their harm not as the race-based denial of a transfer, but as the denial of the ability to compete on equal terms for school transfers. See Comfort, 150 F. Supp. 2d at 296. The right to compete on equal terms is well-recognized as a passable, cognizable interest for standing purposes in cases involving a race-conscious government action. Donahue v. City of Boston, 304 F.3d 110, 119 (1st Cir. 2002) (citing Texas v. Lesage, 528 U.S. 18, 21 (1999)); Comfort, 150 F. Supp. 2d at 296 (citing Lesage and Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280-81 n.14 (1978)).

The flaw in the plaintiffs' argument is that they can show no imminent "competition." Such disadvantage, if it even exists,[66] is speculative where it is not clear that the plaintiffs will again

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had recently started giving sixth grade instruction. Pursuant to the Bollen agreement, Stinson placed her daughter at Pickering for the 2001-2002 school year.

[65] The Plan's safeguards for biracial students ensure that Lynn will not deny a transfer to Stinson's daughter, if she follows the appeals procedures in place.

[66] Indeed, as I discuss below, whether the denial of a transfer ever can be said to work a "competitive disadvantage" injury is another question altogether, when the parties have stipulated that all of Lynn's public schools are equal in quality.

expose themselves to the race-conscious elements of the Plan by seeking transfers in the future. See id. Accordingly, the claims of these plaintiffs for declaratory and injunctive relief are dismissed for lack of subject-matter jurisdiction.

However, the defendants concede that one plaintiff, Gina Leone, who sues on behalf of her son Troy LaMothe, has standing to pursue prospective relief. On March 24, 2000, Leone requested to transfer her son from Ingalls, his neighborhood elementary school, to Aborn. The district denied the transfer. Leone received no relief on appeal, which confirmed that the proposed transfer was segregative and concluded that she did not merit a hardship exception. Pursuant to the agreement of counsel in the Bollen case, Leone was informed that her son could attend any school of her choice for the school year of 2001-2002. Leone chose the Aborn school, to which he otherwise would have been unable to transfer under the Lynn Plan.

b. Nominal Damages

Nominal damages are another matter. The defendants argue that Stinson and Karen Tsaltas have no standing to sue even for nominal damages.[67] Tsaltas's son was denied a transfer, but that denial was reversed on appeal. Stinson, pleased with the alternative assignment that the district offered, never appealed the denial of her daughter's transfer.

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[67] I earlier held provisionally that the Comfort plaintiffs could seek nominal damages. Comfort, 150 F. Supp. 2d at 301-02.

I find that all of the Bollen plaintiffs, including Stinson and Tsaltas, can seek nominal damages, where the threshold for relief is lower.[68] Stinson and Tsaltas's transfer requests were both at least initially denied pursuant to the race-conscious elements of the Lynn Plan. Since I held that Samantha Comfort could pursue nominal damages notwithstanding her successful appeal, the same must be true for Tsaltas despite her appeal, and certainly for Stinson, who did not appeal. The Motion to Dismiss on the issue of nominal damages is denied.

B. Equal Protection

The plaintiffs challenge the RIA on its face and as applied in the Lynn Plan under the Equal Protection Clause of the Fourteenth Amendment. They urge the Court to evaluate the Act and the Plan by the standard of "strict scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); Wessmann, 160 F.3d at

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[68] For an extended discussion of the availability of nominal damages, see Comfort, 150 F. Supp. 2d at 298-30.

794. Under strict scrutiny, a racial classification is unconstitutional unless its proponent can establish, first, that the policy furthers a compelling state interest, and second, that it is narrowly tailored to achieve that interest. Adarand, 515 U.S. at 227. The burden of proving a compelling interest and narrow tailoring rests on the defendant. Keyes v. School Dist. No. 1, Denver, Colorado, 413 U.S. 189, 209 (1973).

As I discuss below, courts have used a different level of scrutiny, namely "intermediate scrutiny," for policies that are race-conscious but do not classify, i.e., prefer, members of one race over another. See, e.g., Jacobson v. Cincinnati Bd. of Education, 961 F.2d 100, 102 (6th Cir. 1992); Kromnick v. School Dist., 739 F.2d 894, 902-03 (3d Cir. 1984). This test requires the government to show that the policy serves "important government objectives" to which the means chosen are "substantially related." United States v. Virginia, 518 U.S. 515, 533 (1996) (citations omitted). Amicus filings in this case argue that I should apply intermediate scrutiny to the Lynn Plan, whereas the parties prepared and argued their cases on the assumption that the Plan is subject to strict scrutiny.

1. **Strict or Intermediate Scrutiny?**

Amici propose that I apply intermediate scrutiny to the Lynn Plan and the RIA because neither makes a racial classification in the sense of preferring the interests of one race over another. That is, while in Adarand the Court subjected a racial classification to strict scrutiny, the mere consideration of race, where no preference is given to members of one race over another, is distinguishable.

The Adarand Court confronted a federal policy that gave financial incentives to contractors on government projects to subcontract their work to small businesses certified as controlled by "social or economically disadvantaged" individuals. The policy presumptively designated racial minorities as "socially disadvantaged." Adarand, 515 U.S. at 205-07. Adarand Constructors, Inc., which was not so certified, did not get a subcontract despite its low bid.[69]

The Court held similarly in other cases involving the use of race to prefer minorities for other benefits of limited availability, i.e., statutory incentives to government contractors to favor minorities, City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493-94 (1989); racial preferences in the hiring and promotion of government workers, United States v. Paradise, 480 U.S. 149, 153 (1987); and redistricting efforts directed at carving out enclaves of minority voters, e.g., Bush v. Vera, 517 U.S. 952, 965-67 (1996); Miller v. Johnson, 515 U.S. 900, 904 (1995).

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[69] The Court remanded the case to determine if the federal policy satisfied strict scrutiny. After numerous further appeals and remands, the then-current program was found to meet "strict scrutiny." Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1187 (10th Cir. 2000)(holding that "the relevant programs now meet the requirements of narrow tailoring").

In contrast, courts including the First Circuit have held that where differential treatment does not favor members of one race over another, there is no racial classification, Adarand is inapposite, and strict scrutiny does not apply. See, e.g., Raso v. Lago, 135 F.3d 11, 16 (1st Cir. 1998) ("The term [racial classification] normally refers to a governmental standard, preferentially favorable to one race or another, for the distribution of benefits.");[70] cf. Wessmann, 160 F.3d at 794

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[70] Raso involved the redevelopment of portions of the predominantly white Old West End in Boston. The Boston Redevelopment Authority ("BRA") required the developer to give preference to displaced prior residents (mostly white) in leasing the redeveloped premises. The developer, in turn, sought funding from the federal Department of Housing and Urban Development ("HUD"), which was operating at the time under a consent decree that required it to press for "the achievement of a racial composition, in HUD-assisted housing located in neighborhoods which are predominantly white, which reflects the racial composition of the City [of Boston] as a whole." Raso, 135 F.3d at 14 (alteration in original). HUD, the BRA, and the developer drafted a plan that reduced the number of units subject to the displaced resident preference. A class of Old West End residents challenged the result under the Equal Protection Clause, citing the plan's racial motive of integrated housing.

The First Circuit affirmed the district court's dismissal of the case, rejecting the strict scrutiny test. The court held that a mere "racial motive" does not raise equal protection concerns; every anti-discrimination statute has an underlying racial motive, and none of them are regarded as constitutionally suspect. Id. at 16. In addition, unlike the situation in Adarand, there was no racial classification to scrutinize because no preference was given to one race over another. See id.

The parallels between Raso and this case are substantial. In Raso, a government preference for displaced tenants would result in segregation. The government therefore decided to modify (but not eliminate) the prior tenant preference in order to foster more integrated housing. Similarly, in this case, a government policy of neighborhood school assignment would result in segregation. The government therefore decided to allow transfers that promote integration. In both cases, the government is taking race-conscious action aimed at integration. In both cases, the policy is race-neutral on its face, in that it does not favor one race over another, although individuals may be deprived of a benefit they otherwise might have received. The one difference (quoting *Adarand*'s requirement that "a government 'must justify any racial classification subjecting [a] person to *unequal treatment* under the strictest judicial scrutiny'" (emphasis added) (alteration in original)).

Amici point out that in the present case, the evidence shows that each Lynn school provides equal educational opportunities to students. Indeed, the parties even stipulate, "the education provided to Lynn's regular education students in each of the elementary, middle, and high schools in Lynn is comparable in quality, resources, and curriculum, even though schools do offer and provide varying academic programs."[71] Thus, this is not a case, as in *Adarand* (government contracting), *Bakke* (medical school admissions), or *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S.Ct. 618 (2002) (law school admissions), in which the defendant, in the distribution of

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here is that the Lynn Plan is race-*conscious* on its face and the plan at issue in *Raso* was not. Accordingly, where *Raso* did not undertake any equal protection scrutiny, *amici* propose intermediate scrutiny in this case, in keeping with the practice of other courts that have examined similar issues.

[71] Although Lynn officials refer to some of the city's schools as "magnet schools," this is something of a misnomer. Ordinarily, the term "magnet school" refers to schools that confer unique educational benefits and draw from a districtwide geographic base through a lottery system. *See, e.g.*, *Hampton v. Jefferson Cty. Bd. of Education*, 102 F. Supp. 2d 358, 377 (W.D. Ky. 2000); *see also, e.g.*, *Tuttle v. Arlington Cty. School Bd.*, 195 F.3d 698, 701 (4th Cir. 1999). In contrast, as described in section IV.E.6, *supra*, Lynn's so-called "magnet" schools are really just neighborhood schools with a "theme" designed to attract some transfer applications and thereby promote integration. While parents may prefer a particular school for any number of subjective personal reasons -- the school's "theme," geographic proximity to a parent's workplace, etc. -- the parties agree that Lynn's schools, and the educational benefits they provide, are essentially fungible.

limited resources, gives preference to some persons on the basis of race. Students like the plaintiffs may not be able to attend the specific school they want, but no student is advantaged over another on the basis of race. Cf. Hampton v. Jefferson Cty. Bd. of Education, 102 F. Supp. 2d 358, 380 (W.D. Ky. 2000) (observing that race-based assignment in elementary and secondary school education is distinguishable from other contexts in which strict scrutiny is applied, where assignment to one school over another does not confer a preference based on race).[72]

Indeed, in an earlier decision, I analogized the Lynn Plan to a situation in which a school administrator sought to assign students to classrooms within a given building in order to maximize diversity and to prevent minority children from choosing one classroom and white children another. *Comfort*, 100 F. Supp. 2d at 67 n.17.[73] Clearly this kind of decision would not warrant strict scrutiny.

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[72] As the Hampton court aptly observed:

> The workplace, marketplace, and higher education cases are poor models for most elementary and secondary public school education [cases] because they always involve vertical choices -- one person is hired, promoted, receives a valuable contract, or gains admission. Ordinarily, when [the Jefferson County school system] assigns students to a particular elementary, middle, or high school, the assignment has no qualitative or "vertical" effects. This is because the Court concludes that as between two regular elementary schools, assignment to one or another imposes no burden and confers no benefit. The same education is offered at each school, so assignment to one or another is basically fungible. As a logical consequence, most courts have concluded that there is no individual right to attend a specific school in a district or to attend a neighborhood school. . . . Under this analysis, [the Jefferson County school district] would not be prohibited from using race in its general student assignments to maintain its desegregated school system . . . .

Hampton, 102 F. Supp. 2d at 380 (footnote and citations omitted).

I recognize, however, the need to proceed with caution. The parties may agree that all of Lynn's schools provide equal educational opportunities, but the voluntary transfer system is rooted in the principle that parents will find one school preferable to another for personal reasons -- *e.g.*, the convenience of its location or attractiveness of its "theme" program. As a result, although I am convinced by *amici* that intermediate scrutiny is the correct test to apply here, my analysis below will apply the more rigorous standard which the parties have briefed, strict scrutiny.

2. **Facial Challenge to the Racial Imbalance Act**

The plaintiffs argue that the RIA violates the Equal Protection Clause of the Fourteenth Amendment and is therefore facially invalid. The standard for facial invalidation of a statute is rigorous: "[T]he challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987).[74] It is clear to me that the plaintiffs cannot make out a facial claim against the statute.

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[73] Likewise, courts in the Sixth and Third Circuits have refused to apply strict scrutiny to school district policies that assigned teachers to certain schools based, in part, on their race. *Jacobson*, 961 F.2d at 102-03; *Kromnick*, 739 F.2d at 903. The *Jacobson* court found that intermediate scrutiny was warranted because, as the *Jacobson* court observed, the teacher assignment plan at issue "is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers." *Id.*

An even stronger case for intermediate scrutiny can be made here, where the parties have stipulated that no one school is superior to another -- a concession that was not apparent in *Jacobson* or *Kromnick*.

As I have noted above, the RIA includes both hortatory and mandatory components. The statute urges school districts to adopt voluntary plans to alleviate racial imbalance. Mass. Gen. Laws c.

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[74] The Salerno Court observed that where First Amendment claims are raised, there is another basis for invalidation, namely, overbreadth, which plainly does not apply here. Salerno, 481 U.S. at 745.

Other courts also have suggested that the broad language of Salerno may no longer be valid. As the Seventh Circuit observed, the Supreme Court in both Stenberg v. Carhart, 530 U.S. 914 (2000), and Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), invalidated abortion restrictions that "might have been construed by the state courts to have at least some proper applications," without even mentioning Salerno. A Woman's Choice--East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002). Thus, the Eighth Circuit has concluded that "an abortion law is unconstitutional on its face if, 'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'" Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452, 1457 (8th Cir. 1995) (quoting Casey, 505 U.S. at 895). A more general standard could be applied outside the abortion context that would "hold a law to be facially unconstitutional when it would operate as a substantial obstacle to an otherwise lawful course of action in a large fraction of relevant cases." S.D. Myers, Inc. v. City & Cty. of San Francisco, 253 F.3d 461, 467 (9th Cir. 2001) (ultimately concluding, "we will not reject Salerno in other [non-abortion] contexts until a majority of the Supreme Court clearly directs us to do so").

This debate is of little import here. First, the First Circuit has not yet joined this fray and continues to use the Salerno standard for facial challenges. See Pharmaceutical Research and Mfrs. of Am. v. Concannon, 249 F.3d 66, 77 (1st Cir. 2001). Second, this Court is not aware of any decision repudiating Salerno outside the context of abortion restrictions. Third, even if the narrower Casey standard applied, there is no suggestion in this case that the RIA in any way restricts, impedes or deters lawful action "in a large fraction of relevant cases." Fourth, in contrast to the constitutional right to abortion, there is no constitutional right to school choice.

71, § 37C. The state is also empowered to induce compliance by offering grants and/or by withdrawing existing financial assistance. Id., § 37I; Mass. Gen. Laws c. 15, § 1I, ¶¶ 2, 3, 4. However, if space limitations preclude a school district from accommodating a desegregative transfer out of a neighborhood school, the mandatory provisions of the Act are triggered. The school district is then required either to devise its own plan to accommodate such a transfer (subject to the approval of the state Board of Education) or to implement a plan drafted by the state. Mass. Gen. Laws c. 71, § 37D; Mass. Gen. Laws c. 15 § 1I, ¶ 1.

Although the plaintiffs challenge it, the mandatory provision of Section 37D is not at issue here;[75] Lynn adopted its plan voluntarily. The state never found that space constraints in Lynn schools precluded requested desegregative transfers. The compulsory provisions of the RIA were never triggered. As such, the plaintiffs can claim no injury from the mandatory provisions of the Act. See Daggett v. Comm'n on Governmental Ethics and Election Practices, 205 F.3d 445, 463 (1st Cir. 2000) (citing Lujan, 504 U.S. at 560).

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[75] Were I to reach the challenge to the mandatory provision, the same principles that govern the constitutionality of the Lynn Plan would apply here, as the trigger for the provision -- namely, the denial of a student's request for a desegregative transfer -- uses race in much the same way as the Lynn Plan does.

Plaintiffs claim that the distinction between the mandatory and hortatory elements of the law is a distinction without a difference. The statute, they say, not only encourages school districts to adopt racial balancing plans and rewards compliant school districts with funds, Mass. Gen. Laws c. 15, § 1I, ¶¶ 3, 4, it effectively coerces this practice by making state assistance to school districts contingent on the implementation of these "voluntary" plans, id., § 1I, ¶ 2.

But even if I were to find that the RIA's use of funds to encourage voluntary plans were in fact coercive, and therefore the functional equivalent of its mandatory provisions, I would not find it unconstitutional. A school district may theoretically adopt a plan that improves racial imbalance without explicitly introducing race-based criteria at all.[76] In fact, the City of Boston satisfied the Board of Education's RIA review with a student assignment policy that this Court recently found to be completely race-neutral. Boston's Children First v. Boston School Comm., ___ F. Supp. 2d ___, ___, available at 2003 WL 1957480, at

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[76] The plaintiffs admitted as much at trial, when I raised the following hypothetical: Assume two contiguous school attendance zones, one of which is predominantly minority and the other predominantly white. Plaintiffs' counsel conceded that a school district would satisfy the RIA and the Equal Protection Clause if it closed the two schools and opened a new, larger school between the neighborhoods that consolidated the student populations. Similarly, if a small district with racially identifiable school attendance zones built a single central elementary, middle, and high school to absorb its entire enrolled student populations, this strategy would qualify as a racial balancing plan under the RIA, and it would not trigger any equal protection scrutiny.

*9 (D. Mass. Apr. 23, 2003) (observing that the state Board of Education accepted Boston's school assignment plan even though it did not incorporate racial enrollment targets or racial guidelines and likewise finding it immune to equal protection challenge).[77]

Moreover, the fact that the goal of the RIA's funding is race-conscious -- to improve racial balance in the Massachusetts schools -- does not necessarily invalidate it. See Raso, 135 F.3d at 16. Were that the case, Congress could never validly exercise its § 5 enforcement powers. See U.S. Const., amend. XIV, § 5 (noting that Congress "shall have power to enforce, by appropriate legislation, the provisions of this article," including the Equal Protection Clause of § 1). All nondiscrimination statutes take notice of race in some way.

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[77] The plaintiffs in this case also facially challenge the provision of the RIA that reimburses the transportation costs of desegregative transfers. Mass. Gen. Laws c. 15, § 1I, ¶ 3 provides, in pertinent part:

> The commonwealth shall . . . pay to a city, town, or regional district school committee one hundred percent of the cost of transportation of non-white pupils and minority pupils . . . transferred from schools in which racial imbalance exists and one hundred per cent of the cost of transportation of white pupils transferred from schools in which racial isolation exists to schools in which racial imbalance or racial balance exists for the purpose of reducing or eliminating racial imbalance as provided by said section thirty-seven D.

Unlike the RIA provisions that fund and encourage racial balancing plans, which admit of race-neutral possibilities (e.g., locating schools on the borders of segregated enclaves), the Commonwealth's decision to reimburse transportation costs necessarily takes account of a student's race in each transfer. Although reimbursements may be made available to all students, white or nonwhite, who choose desegregative transfers, whether or not a transfer is desegregative, and therefore eligible for state funding of its transportation costs, must turn in part on the student's race (as well as the racial makeup of the student's current and destination schools).

This fact would trigger the same form of equal protection scrutiny that I apply to the Lynn Plan, which approves desegregative and neutral transfers, but not those that would exacerbate racial imbalance.

However, the reimbursement provision bears only on the question of which government entity -- the state or the school district -- pays the transportation costs of a transfer. There is no evidence in the record to suggest that any student's transfer went unfunded by Lynn or the Commonwealth. As such, it is difficult to see what possible injury students could suffer as a result of one government entity's funding their school transportation costs, as opposed to another. Absent any injury, the plaintiffs' facial challenge to the RIA on this basis must fail. See Casey v. City of Newport, R.I., 308 F.3d 106, 119 (1st Cir. 2002) (reciting the standing requirement that the plaintiff's claimed injury be causally related to the action it challenges).

3. **The Strict Scrutiny Standard**

As noted above, proponents of a racial classification ordinarily must demonstrate that it advances "a compelling state interest," an interest above and beyond ordinary government goals, and further, they must demonstrate that the classification is "narrowly tailored" to that end.

While these questions are ultimately questions of law, Cotter v. City of Boston, 193 F. Supp. 2d 323, 341 n.8 (citing Wygant v. Jackson Bd. of Education, 476 U.S. 267, 274-76 (1986)), and legal precedent can give guidance to courts, each case turns on the peculiarities of its own facts. See, e.g., Wessmann, 160 F.3d at 797-98, 802 (finding the necessity of a race-based policy to be a "fact-sensitive inquiry" and cautioning that the "devil is in the details").

An important part of this "fact-sensitive inquiry" is the setting -- that is, the kind of policy at issue and the context in which it operates. Significantly, the Supreme Court has not yet heard a case dealing with the issues raised here -- the use of race in a voluntary transfer program to maximize integrated learning in the K-12 grades. It is not easy to apply to public elementary school education the same legal frameworks established for employment, as, for example, in Adarand or Croson,[78] or even higher education, as in Bakke. Nor is it easy to apply legal standards designed to analyze when race may be used retrospectively, to remedy past intentional discrimination, in settings where race is used prospectively, as part of a curriculum that encourages students to learn to interact in a multiracial environment.

a. Compelling State Interest

"Diversity" may well be a compelling state interest in an educational setting, depending on the nature of the setting and the reasons why diversity is sought. In Regents of the University of California v. Bakke, 438 U.S. 265 (1977), the Supreme Court evaluated an affirmative action program for medical school admissions. The University of California argued that it had a compelling interest in cultivating a "diversity" of viewpoints in its student body, and that an applicant's racial background was relevant to the views that he or she would bring to the class. Id. at 311-15. A plurality of the Court held that "genuine diversity" was a valuable contributor to a "robust exchange of ideas" at the university and so passable as a compelling interest. Id. at 312-14. The Court explained, however, that the university's use of race and ethnicity alone in its cultivation of genuine diversity would "hinder rather than further [its] attainment." Id. at 315. In other words, the university could not establish that its policy furthered its announced compelling interest of fostering "viewpoint diversity," because that interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." Id.

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[78] See Wessmann, 160 F.3d at 829 (Lipez, J. dissenting) (observing on the subject of numerical goals that elements of the "narrow tailoring" analysis may not make the transition from the employment to the educational context gracefully; education, after all, is directed at shaping individuals in a prospective manner").

Considerable debate has followed Bakke about the extent to which racial diversity can ever be a compelling interest. What the Bakke Court did make clear was that sounding the inherent value of "diversity" is not enough; the analysis is incomplete unless one looks to the specific, tangible benefits that diversity actually confers in a given situation.[79]

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[79] This Court recognized that axiom in McLaughlin v. Boston School Comm., 938 F. Supp. 1001 (D. Mass. 1996), in which it observed that "the phrase 'educational diversity' is less than fully explanatory . . . . It is, rather, the many educational benefits to which racial [and] ethnic diversity might be thought a conduit that, when taken together, constitute the compelling diversity interest defendants here assert." Id. at 1014.

The First Circuit spoke to this issue in Wessmann. There, the court confronted the Boston school district's racial preference to African American and Hispanic applicants in its admissions process to the Boston Latin School, a competitive and prestigious public high school to which students applied for limited slots and were selected for admission primarily on the basis of academic merit. Wessmann, 160 F.3d at 791, 793. Following Bakke's cue, the Wessmann court observed that Boston Latin's exclusively racial preference could not foster the "genuine diversity" approved in Bakke. Nevertheless, in Wessmann, the court (following the Second, Fourth and Ninth Circuits) refused to hold that race-based classifications are constitutional only when they are directed at redressing prior unlawful discrimination. Id. at 795-96. In that regard, the court expressly parted company with the Fifth Circuit's holding in Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

And further, like the Second, Fourth, and Ninth Circuits, the Wessman court acknowledged that diversity could well be a compelling state interest in an educational setting, depending on the circumstances. Wessmann, 160 F.3d at 796; see also Brewer v. West Rondeeeequoit Cent. School Dist., 212 F.3d 738, 748-49 (2d. Cir. 2000) (citing Eisenberg v. Montgomery Cty. Pub. Schools, 197 F.3d 123, 130 (4th Cir. 1999) (assuming that diversity can be a compelling interest)), and Hunter v. Regents of the Univ. of Cal., 190 F.3d 1061, 1067 (9th Cir. 1999) (affirming the constitutionality of race-based admissions processes to an experimental elementary school based on the need for researchers to work with racially diverse classes of students)).[80] The court rejected an all-or-nothing approach: Fostering diversity is not always a compelling interest, nor is it true that diversity is never a compelling interest. Id. at 796 ("[W]e assume arguendo . . . that some iterations of 'diversity' might be sufficiently compelling, in specific circumstances, to justify race-conscious actions.").

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[80] The Wessmann court also cited Lutheran Church-Missouri Synod v. Fed. Communications Comm'n ("Lutheran Church"), 141 F.3d 344 (D.C. Cir. 1998), which rejected FCC equal employment opportunity regulations that used a racial classification directed at "fostering [radio] programming that reflects minority viewpoints or appeals to minority tastes." Id. at 354.

In so doing, the D.C. Circuit addressed whether the goal of promoting "diverse" programming satisfied the compelling state interest standard and concluded that it did not. The setting, however, was very different from the instant case. Since the FCC never defined what "diverse programming" meant, and any content-based definition would raise First Amendment concerns, the Court suggested that the "government's formulation of the interest seems too abstract to be meaningful." Id. While it acknowledged that an earlier Supreme Court decision (in Metro Broadcasting v. Fed. Communications Comm'n, 497 U.S. 547 (1990)), recognized such an abstract diversity interest as "important," the court suggested that this characterization was bound up in the Court's use of intermediate scrutiny in Metro Broadcasting, a standard that Adarand had overruled in the interim. Id. In any event, the diversity interest at issue in Lutheran Church was an interest in viewpoint diversity that is not at issue here, and which the First Circuit found absent in the Boston Latin policy. Wessmann, 160 F.3d at 798.

In the Wessmann decision the First Circuit found Lutheran Church to have limited import. Wessmann, 160 F.3d at 795 ("We think that any . . . consensus [among the circuit courts that diversity may never be a compelling interest] is more apparent than real. In the education context, Hopwood is the only appellate court to have rejected diversity as a compelling interest, and it did so only in the face of vigorous dissent from a substantial minority of the active judges in the Fifth Circuit." (emphasis added)).

Although Wessmann and Bakke address race-conscious policies in public education, their holdings are of limited import here. First, both involve race-based preferences in the allocation of a limited government resource -- a slot in a medical school or in an elite and selective high school. This is not an issue in Lynn. Second, in each case the defendant sought to justify its preference on the ground that, in the abstract, racial diversity is necessary to ensure viewpoint diversity. In contrast, Lynn's appeal to diversity as described below is directed at altogether different and more specific goals, namely, preparing students to be citizens in a multiracial society and eliminating the concrete harmful consequences that de facto segregation inflicts on a public school system.

b. **Narrow Tailoring**

The goal of the "narrow tailoring" requirement is to ferret out illicit uses of race by governments, to make certain that a racial classification is neither pretextual nor overbroad. Croson, 488 U.S. at 493; Boston Police Super. Officers Fed'n v. City of Boston ("Boston Police"), 147 F.3d 13, 23 (1st Cir. 1998). Three concerns are evident in the case law: (1) the extent to which the challenged policy is necessary to pursue a compelling interest (and whether there are adequate race-neutral alternatives), (2) the extent to which the policy is proportional to that interest, and (3) the proportionality between the benefits the policy provides and the harm caused to "innocent persons" as a result of its implementation.

(1) **Are the means necessary; are there adequate race-neutral alternatives?**

The question of necessity logically breaks down into two components -- (1) does the race-based policy actually further the compelling interest? and (2) might race-neutral alternatives to the policy be as effective in pursuing the interest?

It goes without saying that a race-conscious policy is not narrowly tailored to a compelling interest if it does not, in practice, effectuate the ends contemplated by that interest. A classification that does not further the legitimate ends of government obviously would not even survive the less exacting rational basis review reserved for nonracial classifications. *E.g.*, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001). Strict scrutiny incorporates this bare-minimum requirement, but reaches still further for a showing of necessity.

Since "narrow tailoring" is all about the "fit" between compelling ends and race-conscious means, a review of the goals of the enterprise and its settings is critical. The mission of the schools in *Wygant*, 476 U.S. at 270-71 (reviewing preferential protection from layoffs for minority teachers), was to educate students. The mission of the City of Richmond in Croson, 488 U.S. at 481 (reviewing preferences for minority contractors), was to install plumbing fixtures in a city jail. The mission of the Alabama Department of Public Safety in Paradise, 480 U.S. at 153 (reviewing racial preferences in state trooper promotions), was to provide public safety. The reason for being, respectively, of these institutions was not to provide work for teachers, contracts for minority-owned businesses, or promotions for African American troopers. In those settings, the Court's analysis started with proposed compelling interests and institutional ends askew. While that does not mean that such programs necessarily fail to pass constitutional muster, it does mean that the program's proponents face an especially complex task of justification.

In contrast, an important mission of K-12 schools, in addition to fostering academic achievement, is the cultivation of social skills that enable students to function as citizens in a complex and diverse world. If "narrow tailoring" is about "fit," the creation of an integrated school environment is surely likely to be a better "fit" relative to this goal than an integrated workplace is to a commercial setting.

Moreover, where educational policy is concerned, in contrast to a commercial enterprise, school officials possess a special expertise acknowledged in the case law. That expertise must play an important role in evaluating whether race-neutral alternatives will be effective in creating a multiracial learning environment and whether they are adequate to the task. See infra Section V.B.3.b.(4).

(2) Is the policy proportional to the compelling interest?

Courts must also ascertain the extent to which the imposition of the challenged policy is proportional to the urgency of the stated government interests. A race-based government practice must not overshoot its articulated purpose by using race too often, too heavy-handedly, or for too long.

Again, the examples come from employment. In order to determine whether the use of race went beyond what was remedial, the Paradise Court, for example, scrutinized the quantum of racial preferment given to minorities and its relationship to the defendant's interest in remedying the effects of discriminatory hiring practices. Paradise, 480 U.S. at 179. The Court focused on the proportionality between the "numerical relief ordered and the percentage of nonwhites in the relevant work force." Id.

Where the means are modest, and in fact undershoot the remedial goal, a court will affirm the policy, as in the Cotter case. The City of Boston departed from strict rank order to promote African American police officers in three of thirty-six promotions. Since the police department would have had to promote twenty African American officers to equalize the percentage of African American officers and African American sergeants, the Court concluded that the modest means chosen signified narrow tailoring. Cotter, 323 F.3d at 171.[81]

A policy that is flexible and changes with changing conditions is also more likely to meet the proportionality test. Id. at 177-78. In addition, the duration of the state actor's use of race figures into the analysis. Id. at 172; see also, e.g., Paradise, 480 U.S. at 178 (touting the limited duration of a race-based remedial promotions policy as a sign that the policy was not a tool for the implementation of racial balancing in government employment); Boston Police, 147 F.3d at 23 (inquiring into whether the challenged policy "contains (or fails to contain) built-in mechanisms which will, if time and events warrant, shrink its scope and limit its duration").

Duration is an especially critical factor when the compelling interest involves remedying past discrimination. Once the problem is "cured," the need for race-based standards arguably disappears. Mackin v. City of Boston, 969 F.2d 1273, 1278 (1st Cir. 1992)

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[81] The Court cited McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998), for the proposition that the narrow tailoring test is "whether the increase is a plausible lower-bound estimate of a shortfall in minority representation among [sergeants] that is due to the [Department's] intentional discrimination in the past." Id. at 1224.

("Finally, the decree's life is limited, remaining in force only until its requirements have been met. Limitations of this sort are crucial factors in deflecting overbreadth challenges." (citation omitted)). In contrast, where the targeted problem is ongoing and persistent, the analysis is more complex. Narrow tailoring does not necessarily require a predetermined shut-off point. The parties can offer a more fluid approach so long as the race-conscious policy dovetails with the conditions that made it necessary in the first place.

(3) What Is the Impact on Third Parties?

A court will also assess the promised and proven benefits of the racial criterion against the depth and breadth of its impositions upon innocent third parties. Bakke, 438 U.S. at 308-09. Innocent third parties are more at risk in decisions about hiring and firing in a commercial setting, the awarding of public contracts, or admission into a school of higher education. Each case represents the classic zero-sum game, where one party wins and another necessarily loses.

Moreover, where the benefit requires specialized skills, the impact on a qualified applicant with settled expectations, or even with an entitlement to the job or to a slot in a school, is more significant. See Paradise, 480 U.S. at 182 (finding significant the fact that a racial classification prefers only qualified applicants of one race for hiring or promotion, and that the impact on qualified applicants of another race is minimal); Boston Police, 147 F.3d at 24 (listing "the extent to which . . . legitimate expectancies are frustrated or encumbered" as a factor in the narrow tailoring analysis).

Again, in a K-12 school system, educational and curricular policies intended to benefit all students may have an impact on "innocent third parties," but not to the same degree as in competitive commercial or higher-education settings. The question in a school setting, to which I have already alluded, is not whether a given plaintiff will receive a given limited benefit (like a job or access to a unique institution of higher learning) to which he or she is entitled. Rather it is whether any student is entitled to a particular school assignment at all and, in any event, whether the education the plaintiff will get at his or her second choice is comparable to that which he or she would receive at his or her first choice.

(4) Miscellaneous Concerns: Deference to School Boards' "Narrow Tailoring"

A school setting necessarily raises other questions relevant to the "narrow tailoring" analysis: To what extent do school boards deserve deference in making school assignment decisions that are intertwined with curricular decisions? Or, to rephrase the question, how far must a federal court go to micromanage the school board's choices, after the court has assured itself that the basic constitutional standards are met? How perfect must be the "fit" once the broad legal standards have been met?

Clearly, in the school cases involving remedial race-conscious plans imposed to eliminate the vestiges of prior de jure segregation, courts have carefully supervised local school boards to make certain that they were dismantling the dual school systems for which the school boards were found responsible. But when the records have suggested that those boards were finally operating in good faith to create an integrated system, the courts have done an about-face, giving deference to their determinations that unitary status has been achieved and that remedial plans should be discontinued. See Freeman v. Pitts, 503 U.S. 467, 489-90 (1992). As the First Circuit has observed:

> Unitary status is not simply a mathematical construction. One non-quantitative factor of particular significance is whether the school defendants have a sufficiently well-established history of good faith in both the operation of the educational system in general and the implementation of the court's student assignment orders in particular to indicate that further oversight of assignments is not needed to forestall an imminent return to the unconstitutional conditions that led to the court's intervention. See Morgan v. McDonough, 689 F.2d 265, 280 (1st Cir. 1982) ("the ending of obstructionism plainly signals a return to greater local control"). . . .

> The relevance of good faith underscores the notion that unitariness is less a quantifiable "moment" in the history of a remedial plan than it is the general state of successful desegregation.

Morgan v. Nucci, 831 F.2d 313, 831 (1st Cir. 1987). It is only logical to afford at least as much deference to a school board that voluntarily undertakes desegregation efforts.

In Swann v. Charlotte-Mecklenburg Bd. of Education, 402 U.S. 1 (1971), one of the first remedial cases, the Court described the deference due to school districts in dicta:

> School authorities are traditionally charged with broad power to formulate and implement education policy and might well conclude, for example, that in order to prepare to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of constitutional violation, however, that would not be within the authority of the federal court.

Id. at 16. Swann was cited by the Second Circuit in Brewer, 212 F.3d at 749, a nonremedial case affirming a race-conscious school transfer program to ameliorate the impact of de facto segregation.

There are good reasons to give deference to school boards' attendance to the details of their student assignments and determinations of whether race-neutral alternatives are adequate.

They are the experts in what will or will not work because they are uniquely attuned to the needs of a diverse urban community. Over and over again, courts have given school boards discretion to weigh the constitutional rights of students against the unique demands of a public education setting and curricular needs. See, e.g., Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (emphasizing courts' "reluctance to trench on the prerogatives of state and local educational institutions," as federal courts are ill-suited to "evaluate the substance of a multitude of academic decisions that are made daily" by experts in the field).[82] To be sure, strict scrutiny requires a rigorous analysis of the plan and its ramifications. Nevertheless, these cases should, at the very least, inform the weight I give to the conclusions of the administrators of the Lynn Plan.

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[82] See also Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 664-65 (1995) (holding that random drug testing of student athletes in public schools does not violate the Fourth and Fourteenth Amendment protections against unreasonable searches and seizures); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (holding that the contents of a school newspaper were a curricular matter within the school's discretion such that the principal's significant edits did not implicate the First Amendment); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding that a sexually suggestive student government speech was not protected by First Amendment free speech and expression rights); New Jersey v. T.L.O., 469 U.S. 325, 339-41 (1985) (holding that to require probable cause before school administrators might conduct a search or seizure would constrain the school's control and articulating a "reasonable suspicion" test for Fourth Amendment cases in the public primary school context); Ingraham v. Wright, 430 U.S. 651, 664 (1977) (holding that "the Eighth Amendment does not apply to the paddling of children as a means of maintaining discipline in public schools"); Goss v. Lopez, 419 U.S. 565, 581-84 (1975) (finding a student's due process rights under the Fourteenth Amendment to be limited in cases of short-term school suspension); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 510-11 (1969) (allowing school officials to regulate student political speech when it threatens "material and substantial interference with schoolwork or discipline").

4. The Goals of the Plan

The Lynn Defendants claim that the race-conscious element of its school assignment plan is narrowly tailored to achieve several compelling state interests. Some interests are proactive, that is, affirmatively related to meeting the curricular goals and the educational mission of a diverse urban public school: promoting racial and ethnic diversity, increasing educational opportunities for all students and improving the quality of education and ensuring student safety. Several interests are more reactive, that is, related to the goal of eliminating the negative effects of de facto residential segregation on public education: reducing minority isolation and ensuring the safety of its public school students. Finally, some goals are related to the federal constitutional requirements spelled out in Brown v. Board of Education and the state constitution.

I have divided these goals into three categories, although they are analytically interwoven.

a. Curricular Goals: "Promoting Racial and Ethnic Diversity," "Increasing Educational Opportunities for All Students and Improving the Quality of Education," "Ensuring Safety"

(1) Are These Curricular Goals Compelling State Interests?

The defendants claim that their goals -- promoting racial and ethnic diversity, increasing educational opportunities for all students, improving the quality of education, and ensuring school safety -- are compelling state interests inextricably tied to the mission of a public K-12 school system. As I have noted, the purpose of the public school system is as much to teach citizenship to its students as it is to teach academic subjects. Indeed, at the elementary school level, to which this challenge is principally directed,[83] teaching citizenship -- the proverbial effort to ensure that students "work and play well with others" -- is one of a school's highest educational priorities.

And this is especially the case in a multiracial, urban community like Lynn. The years predating the Lynn Plan saw a district riven by racial tension, with the promise of still-greater tension due to deepening residential segregation. Lynn school officials had to confront a decline in day-to-day school attendance, a decrease in white enrollment, a sharp increase in incidents of conflict and confrontation between white and nonwhite students, and a specific failure in the district's educational mission: Lynn's students were not prepared to live and work in an increasingly racially diverse society.

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[83] Lynn's high schools all meet the standard for racial balance. Any Lynn student may apply to, or transfer to, any of them. While a high school's mission is surely more academic-oriented than that of the elementary schools, citizenship training is still part and parcel of the enterprise. The testimony of Lynn high school student Nicole Oak, as well as the responses that juniors at Lynn Classical High gave to Dr. Orfield's Diversity Assessment Questionnaire, speak to the value of continuing to teach racial issues through high school.

The Plan was essential to reverse these trends. Its approach was comprehensive, going well beyond a race-conscious transfer policy to include specific curricular offerings on race relations, specialized training for teachers and students on diversity, standardization of curriculum and resource distribution between schools in white and minority neighborhoods, and the establishment of the Parent Information Center to foster parent involvement in the schools.

And the Plan was successful. The defendants point to evidence of significant improvements in Lynn schools occasioned by the district's adoption of the Plan -- improvements that have increased educational opportunities for all students: the amelioration of racial and ethnic tension in Lynn schools, the emergence of a prevalent racial and ethnic tolerance in the schools, increased attendance, a growing feeling of comfort among students in engaging and confronting issues of race, an emerging sense of community that crosses racial barriers, improved student discipline, a stable enrollment of white students, and safer schools.

The plaintiffs concede the importance of these goals. Indeed, they agree that Lynn schools are considerably better and safer than they were before the Plan was instituted. What they dispute is whether the race-conscious elements of the Plan are crucial to achieving these benefits, that is, whether the Plan's use of race is narrowly tailored within the meaning of the law.

(2) Is the Plan Narrowly Tailored to These Compelling Interests?

(a) Are the Plan's Means Necessary to Achieve its Ends?

As a general matter, the Lynn Plan necessarily meets the requirement of narrow tailoring: When a government's ends are fundamentally concerned with race -- and those ends are recognized as compelling -- it is natural that race-conscious means provide the "snuggest fit" to those ends. Brewer, 212 F.3d at 752 (finding that "there is no more effective means" of reducing racial isolation "than to base decisions on race").[84]

The evidence from defendants' impressive array of experts established the essential relationship between the race-conscious aspects of the Plan and the curricular ends outlined above. The evidence establishes the following: If the compelling goal of the Plan is to train citizens to function in a multiracial world, actual intergroup racial contact is essential. No amount of race-neutral resource apportionment would accomplish this result. Second, intergroup contact cannot be achieved with only token numbers of minorities in a overwhelmingly white school (or vice versa). Third, there is a tipping point of 20% white or nonwhite students, well-recognized by experts in this field and dubbed the "critical mass," that is crucial to catalyzing positive intergroup contact.[85]

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[84] See also Elizabeth S. Anderson, Integration, Affirmative Action, and Strict Scrutiny, 77 N.Y.U. Law Rev. 1195, 1243-44 (2002) ("[W]hen the state's purpose is explicitly race-conscious . . . its use of racial means is not only clearly relevant to its purpose, but more narrowly tailored to that purpose than race-neutral means could be.").

(b) Proportionality of the Means

The Plan's use of race is measured and proportional to these compelling goals. The policies that have been implemented are less intrusive than other potential means at the district's disposal. Every parent can choose a neighborhood school for his or her child. A parent has the further option of participating in the district's integration effort. Should the parent choose to do so, his or her child is entitled to any transfer that does not exacerbate racial segregation in the schools.

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[85] As Dr. Dovidio -- as well as each and every one of the other experts noted, the use of race in Lynn's school assignments and its achievement of critical mass was the cause of the improved race relations:

> I focused on trying to distinguish what the effects of the plan were, the effects of achieving 20 percent or more of split within the schools to see if that had effects that seemed to be over and above any other effects, effects that could be explained primarily due to the plan and not due to these other factors.
>
> I didn't come up with -- there was no parsimonious explanation for the improvements that I saw. There was no reasonable explanation. There was no valid explanation that consistently explained the data, except for the plan, in my judgment.
>
> Q. And that is all aspects of the plan?
>
> A. That has to do with the fact that the plan produces the critical mass of 20 percent . . . .

There are no rigid quotas, no unchanging formula -- even with respect to the 20% figure advocated by the experts. While the Plan aims for that number because of its acknowledged effect of improved race relations, only the demographics of Lynn at this time (42% white and 58% nonwhite) make it possible to achieve that number systemwide. In effect, the Plan has a hybrid goal that befits the complexity of the situation and evinces a sensitivity to all of Lynn's constituencies -- to maximize integration and aim for a minimum 20% minority representation, consistent with a neighborhood school system and Lynn's demographics.

The Plan's use of race is flexible, and of limited duration. An automatic shut-off mechanism is built in: If the racial composition of a school falls in line with the districtwide white/nonwhite ratio, the limits on transfers evaporate. In fact, because all of Lynn's high schools meet the district's racial balance standard, students may transfer freely among them, space permitting.

As the demographics of the city of Lynn change, so do the parameters of the Plan. It foists no more or no less "diversity" on the schools of the city than the demographics of the city and a neighborhood system allow.

(c) Minimal Burden on Third Parties; the Issue of Stigma

Finally, Lynn's chosen means place a minimal burden on innocent third parties. Nothing compels a school district to allow parents to choose their child's school. There is no entitlement to attendance at a given school, and no special qualifications or prerequisites for admission to any school.

Nor does any stigma attach to the failure to get one's first choice of transfer school, or to the government's recognition of an individual's race. Part of the thrust of Brown was that *de jure* segregation sent a clear message to minority students that school officials believed they did not belong in classrooms with their white counterparts. Brown, 347 U.S. at 493-94 ("To separate [minority students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

The Lynn Plan sends quite the contrary message -- it conveys to all students that notwithstanding residential segregation, students of different races can and should coexist in integrated, cooperative learning environments, and that the school district is committed to encouraging that. Lynn uses race in school admissions not because an individual student's race matters, but because the district recognizes that race relations matter. Dr. Dovidio testified that racial identity is a social construct: although racial differences are perceived and not real, that perception of difference has enough historical momentum that one must acknowledge it in order to defeat it. Race is the elephant in the room that does not go away until it is confronted.

It has been suggested that when a school district inquires into a child's race at registration for school assignment purposes, that gesture, whatever the underlying motives, leaves an indelible scar on the child's psyche. See Tuttle v. Arlington Cty. School Bd., 195 F.3d 698, 707 & n.12 (4th Cir. 1999). Putting aside the fact that this view, as a general matter, would impugn remedial desegregation orders even in de jure cases, the Lynn school district's commitment to promoting racial harmony and celebrating the city's diversity deprives this argument of any specific force in this case.

Even if it were reasonable to conclude (and I find it highly doubtful) that students in Lynn come away from school registration with the mistaken belief that the district means to remind them of racial difference, everything about the Lynn experience is directed at clarifying and correcting this misapprehension. As Drs. Killen and Dovidio testified in their discussion of the "authority sanction" component of intergroup contact, Lynn's teachers, administrators and staff are committed to the principle that students of all races are to enjoy equal status, that the city's multiracial character is something to celebrate, and that students have much to gain from cross-racial relationships. Indeed, that Lynn officials have tried to accomplish their integrative purpose through a voluntary transfer system -- with neighborhood schools absolutely available should parents so desire -- speaks volumes about their sensitivity to third-party interests.

Unlike programs in colleges and universities, the Lynn Plan does not control access to any limited benefit. The parties agree that all students will get a comparable education. Curricula are standard and the differences between schools are largely variations on a theme. Competency levels are evaluated on a systemwide basis; if any given school falters, remedial action will be taken to ensure that it meets the standards set by its counterparts in the district.

Finally, there are no race-neutral adequate alternatives for integrating the school populations. See infra Section V.B.4.b(3).

(3) Plaintiffs' Arguments Do Not Apply in Lynn

The plaintiffs make several "narrow tailoring" challenges. First, they suggest that the Plan's focus on racial minorities is inconsistent with the end of "genuine diversity." Second, plaintiffs argue that the improvements in Lynn schools could have been accomplished through additional resources.

(a) a White/nonwhite Distinction Is Appropriate

There are sixty-five racial and ethnic groups within Lynn's student population, the plaintiffs argue, and far from targeting classrooms that reflect the range of ethnic diversity in Lynn, the Plan's notions of racial balance seek only to ensure extensive contacts between whites and nonwhites. Relying on Wessmann, the plaintiffs claim that a policy that targets racial diversity, rather than "genuine diversity," can never be narrowly tailored.

Plaintiffs' critique is off the mark. The Plan does not target the "genuine diversity" that the First Circuit found absent in Wessmann. In Wessmann, as I have noted, the court held that the Boston Latin School's commitment to "racial and ethnic diversity" did not comport with the "genuine diversity" that a plurality of the Supreme Court approved in Bakke as a means to foster a robust exchange of ideas. Wessmann, 160 F.3d at 798. Bakke-type diversity is an expressive "diversity of viewpoints" and is predicated on the notion that people of different backgrounds will make unique contributions to academic discourse. As such, it "encompasses a far broader array of qualifications . . . of which racial or ethnic origin is but a single though important element." Id. (quoting Bakke, 438 U.S. at 315) (internal quotation marks omitted)). In any case, race classifications directed at viewpoint diversity, the Wessmann court held, are nothing more than mechanisms for "racial balancing" based on broad generalizations about the contributions different races and ethnic groups will make to the classroom. Wessmann, 160 F.3d at 799.

The Lynn Plan does not pursue "racial balancing" toward the end of filling stereotyped "viewpoint" niches. As I stated earlier:

> The diversity interest defendants argue here makes no assumptions about any groups' unique contribution. Rather, it reflects a concern that elementary school children simply get used to being in classrooms with people different from themselves. In fact, it assumes that the more diverse a classroom is, the more likely students will learn that all people are different no matter what their color or ethnic background. It is not a form of stereotyping, but a method to prevent the formation of stereotypes.

Comfort, 100 F. Supp. 2d at 65, n.12. If the goal is to block the formation of stereotypes and racist attitudes, the most effective route, bar none, is to promote multiracial interaction.

The Lynn Plan's white/nonwhite distinction does indeed, as the plaintiffs suggest, "paint with a broad brush," but one that precisely reflects the facts on the ground in Lynn. Lynn school officials and teachers observed that in the years predating the Plan, racial divisions and ethnic conflict between students occurred predominantly along a white/nonwhite axis. The growing gap in understanding between these groups burdened the schools in ways that more precise shades of racial and ethnic difference did not.

Defense experts cited evidence in developmental psychology to support the view that tolerance of difference begins with acceptance of visible difference. A white elementary school student is more likely to differentiate himself from an English-speaking student in a racial minority than for a white European immigrant student who does not speak his language.[86]

In fact, were Lynn to set its eye on a "true diversity" that reflected in each school the range of sixty-five ethnicities represented in its student body, the Plan's use of race (and now ethnicity as well, which is also subject to strict scrutiny, see Bakke, 438 U.S. at 290) would be substantially more intrusive than is currently the case. The Plan is crafted to use race only as frequently as is necessary to produce a measure of racial diversity that is meaningful enough to enable the schools to teach their students citizenship in a multicultural society. See Jacobson, 961 F.2d at 102 (citing Swann, 402 U.S. at 16)).[87]

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[86] Dr. Dovidio testified as well that race plays "a fundamental part of the socialization of students in America today." Dr. Killen, too, affirmed that race is a "predominant group identity" in American culture.

(b) Additional Resources Would Not Have Been Adequate to Accomplish the Curricular Goals; the Significance of "Critical Mass"

Plaintiffs' second argument is that Lynn could have accomplished the stunning turnaround in the fortunes of its schools since the 1980s with race-neutral policies. They contend that other components of the Plan -- new facilities, increased funding from the state, teachers' commitment to and cultivation of equal status and diversity -- amply account for the strides that Lynn's schools have taken.

Implicit in the plaintiffs' critique are two others: (1) Integrated classrooms are not necessary to achieve the curricular benefits Lynn touts. Merely deluging the system with additional resources would surely do the trick. And (2) even if integrated classrooms are necessary, this race-conscious plan is not required to accomplish them. A free choice plan coupled with magnet school incentives would have been as effective. Because it bears on Lynn's compelling interests in reducing de facto segregation as well as the district's curricular goals, I will address (2) in a separate Section V.B.4.b(3), infra, on whether the Lynn Plan was necessary to effect systemwide integration.

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[87] The categories on which this diversity is based -- white and nonwhite -- have been accepted by other courts, see, e.g., Jacobson, 961 F.2d at 102 (affirming the use of these categories in teacher assignments within a district); Brewer, 212 F.3d at 752-53, (finding, at the preliminary injunction stage, that the use of white/nonwhite categories in deciding student transfer requests at public schools is narrowly tailored to a different kind of compelling interest than "true diversity," such that Bakke's holding is inapplicable).

Deluging the system with resources -- without the race-conscious transfer policy -- would not have been adequate. With respect to intergroup contact, the number of students in a classroom of a racial minority matters. Abstract instruction about racial tolerance is insufficient without meaningful contact with students of a different race. Social psychology literature cited by the defendants' experts instructs that racial isolation adversely impacts both minority attitudes and the attitudes of those in the majority. This impact becomes more pronounced as a racial minority within a group dwindles in size.[88]

There is a point at which the presence of a racial minority becomes substantial enough to catalyze intergroup relations, a tipping point" or "critical mass"[89]: Defendants' experts were unanimous on this issue. Dr. Killen analogized the accrual of intergroup contact benefits to a continuum: as a school's racial balance increases, racial tolerance accrues. Studies suggest, however, that the most significant increase in benefits occurs as the share of a school's racial minority students surpasses the 20% mark. The direct observations of the experts on the ground in

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[88] The experts noted that in other settings, such as employment, this stigmatization is demonstrated to result in poor job performance.

[89] It must be noted that the Sixth Circuit, sitting en banc, confronted the question of "critical mass" in an altogether different context in Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002). Grutter dealt with an equal protection challenge to the use of race as a factor in deciding admissions to the University of Michigan Law School. The university's use of race, as is true of Lynn's, was "aspirationally" gauged to generate a "critical mass" of under-represented minority students in an incoming law school class; that is, it did not guarantee any number of slots to minorities. Id. at 747-48.

However, the compelling interest that the university recited was not the interest at stake here. Grutter argued for the "viewpoint diversity" interest that the Supreme Court recognized as compelling in Bakke. Specifically, a diverse student population in higher education "enrich[es] students' education with a variety of perspectives, experiences, and ideas." Id. at 738 (quoting Bakke, 438 U.S. at 313). The Sixth Circuit upheld the university's admissions practices, id. at 752, and the case is presently before the Supreme Court, Gratz v. Bollinger, 123 S.Ct. 617 (granting certiorari).

Experts and administrators testified in Grutter that a "critical mass" of minority students is necessary to achieve the true benefits of the viewpoint diversity that the university was after. Under-represented minorities must populate a class in sufficient number that they may comfortably contribute their unique viewpoints in classroom discussions without feeling as though they are "spokespersons for their race." Grutter, 288 F.3d.

In contrast, as described above, the "critical mass" sought by the Lynn Plan is different, because Lynn's goal is not viewpoint diversity. As I have said, at the elementary, middle, and high school level, the goal of teaching socialization is at least as important as the subject matter of instruction. The value of a diverse classroom setting at these ages does not inhere in the range of perspectives and experience that students can offer in discussions; rather, diversity is valuable because it enables students to learn racial tolerance by building cross-racial relationships. In this context a meaningful presence of racial minorities -- and of whites at minority-dominated schools -- is crucial not only to reducing feelings of tokenism, but also to disarming stereotypes that students in the classroom majority might harbor about students of other races.

the Lynn schools buttress this view,[90] as did the testimony of teachers, students and administrators.

Plaintiffs counter by suggesting first, that even a few minorities are enough to achieve the effects the Lynn Plan seeks, second, that even if "more" integration is needed, no research provides support for a specific percentage, and finally, whatever the legitimacy of the "critical mass" concept, it is not effected in Lynn. After all, the Plan, keyed to the demographics of the city, does not necessarily assure the critical mass. Several schools already have fallen out of line. Moreover, plaintiffs' expert, Dr. Rossell, testified that as long as schools maintain some degree of heterogeneity (the amount, unclear) such that there is some percentage of both whites and nonwhites to interact cross-racially, it is possible to obtain benefits from intergroup contact.

Plaintiffs' position is totally inconsistent with the credible evidence, and the aspects of the Plan that they identify as the weaknesses of the plan are in fact its strengths. As I have noted earlier, I find Dr. Rossell's testimony to be less than credible and surely less reliable than the defense experts. Although Dr. Rossell based her opinions on twenty-six years of experience with other schools, she made no firsthand observation of Lynn's schools and conducted no surveys or interviews of Lynn's students, teachers, or parents. See Wessmann, 160 F.3d at 804 (discounting an expert's testimony because it "relies on evidence from one locality to establish the lingering effects of discrimination in another"). In fact, at the time she formulated her opinion in this case and for some time afterward, Dr. Rossell's understanding of Lynn's student assignment process was fundamentally wrong. She insisted that it was a "controlled choice plan" that did not guarantee students access to their neighborhood schools. Not only did Dr. Rossell's testimony reflect an unfamiliarity with the conditions in the Lynn district; it is not clear from the record that she ever understood exactly how the challenged practice in this lawsuit -- Lynn's school assignment policy -- actually works.

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[90] Dr. Killen also attributed districtwide racial harmony, improved discipline and attendance, etc. to the Lynn Plan's fostering of integration through school assignment. In her expert opinion, a critical mass of white or nonwhite students is essential to achieving the benefits of intergroup contact. Dr. Killen emphasized that race-neutral factors like diversity training for teachers are desirable, but if "your school is made up of kids who are 90% of one race, whether it's white or black, you're not going to achieve the goals set out that these techniques were designed to accomplish."

Likewise, Dr. Orfield testified that increased de facto segregation that would necessary follow from suspension of the Lynn Plan, see infra Section V.B.4.b, would curtail the citizenship benefits that flow to all students in an integrated environment.

And as to critical points in her testimony, Dr. Rossell has taken contradictory positions in the past. In this proceeding, she testified that there are no "concrete data" that show that a "critical mass" of minority students is a precondition for the success of intergroup contact techniques. Yet a 1983 publication to which Dr. Rossell was a major contributor advocated the very proposition she rejects here, namely, cultivation of critical mass of racial and ethnic minorities within schools.[91] In a striking admission for an expert, Dr. Rossell dismissed the earlier work as not based on "an ounce of research," but instead "on people's intuition." And she testifies as an expert in this case against the Lynn Plan, a position diametrically opposed to the position she took in 1988, when she was a consultant to the Lynn schools and noted that Lynn "stood an excellent chance" of desegregating its schools.

In any event, Dr. Rossell's current positions are without basis. It cannot be her position that there are no scientifically acceptable studies validating the concept of "critical mass." There plainly are, and the defense experts noted, summarized, and cited them -- in testimony that I credit. Rather, what she seems to be saying is that the studies and conclusions of social psychologist somehow do not count, no matter how esteemed the scholar or how peer-reviewed and accepted are his or her findings. To Dr. Rossell, the only satisfactory proof would be statistical, the result of a rigorous multiple regression analysis that quantified intergroup contact benefits and statistically isolated those that were directly attributable to classroom integration.

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[91] This 1983 publication stated:

> A critical mass of students seems to encourage intergroup contact, discourage self-isolation, facilitate the responsiveness of teachers and administrators to the special needs of the minorities, especially when remedial or bilingual programs are needed, and promote more parental involvement in the school.

These are exactly the effects that defendants and their battery of experts have attributed to the Lynn Plan.

Defense experts suggest that such a study cannot be done in Lynn, and indeed, need not be done. For example, Dr. Dovidio noted that the study Dr. Rossell suggested could not be done in Lynn because the range of racial balance (or imbalance) in Lynn's schools is not broad enough to conduct a meaningful study of this kind. Isolation of the importance of racial balance to intergroup contact efforts might be possible if the range were broader -- that is, if some schools enrolled as few at 6% white or nonwhite students. At best, Dr. Dovidio explained, the study that Dr. Rossell proposed "doesn't provide a critical test of [whether] the plan [is] working, it just says within the context of a plan that is working, is more [minority representation] better?"

Moreover, such a study need not be done. Desegregation experts and social psychologists nationwide, using methodologies established in their fields, have conducted studies, published their findings, presented papers, and even testified in court as experts, all concluding that a critical mass of 20% facilitates intergroup contact. Just because Dr. Rossell, a political scientist, rejects their approach does not mean that I should as well. Plainly, not everything admits of quantification.

This is not a case of scientific precision, where too much or too little of an active ingredient ruins a chemical reaction -- and scientific precision should not be required. *See Parents Ass'n of Andrew Jackson High School v. Ambach* (hereinafter "*Andrew Jackson II*"), 738 F.2d 574, 580-81 (2d Cir. 1984) (requiring, for narrow tailoring purposes, that a race-conscious school assignment plan's articulate a "tipping point" for white flight that triggered not "the *only* significant drop in white enrollment," but that triggered "(on average) the *most* significant drop").

The dynamics in this case -- interpersonal relations -- are far more complex than that.[92] Statistical analysis may suffice to establish narrow tailoring in remedial cases, where the state's compelling interest is to correct minority under-representation within an institution, that is, where the wrong to be righted is quantifiable. Where, as here, the compelling interest fundamentally relates to shaping human growth and relations, a Rossell-style multiple regression analysis cannot be necessary -- and arguably could not be sufficient on its own -- to justify the use of race.

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[92] Indeed, the dynamics of human interaction are so complex -- with so many possible internal and external dynamics shaping the course of relationships between white and nonwhite students in Lynn schools -- that I found it difficult to believe Dr. Rossell's claim that her multiple regression analysis could control for all other differences between schools except their measure of racial balance, difficult to believe.

Finally, plaintiffs contend that "critical mass" is obviously not essential because some Lynn schools have achieved positive race relations without these numbers, pointing particularly to the Fecteau-Leary middle school.[93] The defendants' response to this is more convincing. First, as they have noted, the 20% mark is aspirational, not written in stone. The Plan seeks to achieve that level in a manner that is consistent with a neighborhood school model of a student assignment that is in turn keyed to the demographics of Lynn. In any case, all defense experts credibly suggest a continuum of effects leading to the point when intergroup contact is finally significant. It would be absurd to suggest that when a school dips marginally below 20% critical mass, a climate of racial tolerance evaporates and racial infighting instantly follows.[94]

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[93] The Ingalls (81% minority), Cobbet (83%), and Harrington (84%) elementary schools, and the Fecteau-Leary (81%) middle school were all perched below critical mass in the 2001-2002 school year, and Dr. Killen did some of her observations at Fecteau-Leary.

[94] Dr. Killen explained that in Fecteau-Leary, though its white population was at 19% during the 2001-2002 school year, the school had recently reached critical mass, and a number of the elementary schools feeding students into Fecteau-Leary were at or above critical mass.

In any case, what the plaintiffs view as a fatal flaw, I understand to be a point in the Plan's favor. Plaintiffs claim that Lynn's student assignment policy is not narrowly tailored because it is not designed to guarantee a 20% critical mass in every school misses the mark. The Lynn Plan is not a "20% no matter what" plan; the use of race only triggers when the schools pertinent to a proposed transfer deviate too much from districtwide demographics. Were the Plan calibrated to yield, without fail, a 20% critical mass in every school, it would risk characterization as a quota, be needlessly rigid and neglectful of changing conditions in Lynn. Likewise, it would override the wishes of parents who want their children to attend their neighborhood schools and would entail a more intrusive use of race in school assignment than the Lynn Plan currently provides. As such, it would hardly be "narrowly tailored."

In fact, plaintiffs' position turns on its head the very purpose of the narrow tailoring requirement, to invalidate a program because it does not use race enough to establish a perfect "fit" between means and end. As I noted before, the Plan's goals are hybrid and flexible: It effectively generates integration in Lynn's schools in such quantity as to catalyze intergroup contact while still respecting the neighborhood school principle and Lynn's ever-changing demographics. As such, it ensures all the corollary educational benefits to which the parties stipulate.

b. Remedying the Effects of De Facto Segregation: "Reducing Minority Isolation"

(1) Is this Remedial Interest Compelling?

An important goal of the Lynn Plan is to ameliorate the effects of de facto residential segregation. It cannot change demographic patterns. It chose not to trench on the ability of a parent to send his or her child to a neighborhood school. Rather, the Plan tries to shape educational environments that neutralize the effects of these patterns, to make certain that these patterns are not determinative of a child's opportunity. Comfort, 100 F. Supp. 2d at 65 n.12.

A number of adverse educational effects flow from racially segregated schools, as described generally in the Kiernan Report that led to the RIA's enactment, and, more importantly, in the record in this case. In the 1980s the increasing racial polarization of Lynn schools, created in part through official misconduct, led to documented inequalities within the system: minority schools had inferior materials and facilities and the more experienced teachers transferred to the better funded, managed, and maintained white schools.

It would make no sense if Lynn officials were obliged to take responsibility for addressing these adverse consequences but at the same time were constitutionally barred from taking voluntary action aimed at nipping some of these effects in the bud. In effect, what the Plan sought to do was to forestall the development of racially isolated schools before the separation and the inequities become so intense that even more intrusive action -- perhaps court-ordered -- was required.

Plainly the "reduction of racial isolation resulting from de facto segregation can be a compelling government interest justifying racial classifications." Brewer, 212 F.3d at 753. In Brewer the Second Circuit vacated a district court's preliminary injunction suspending the race-conscious elements of a student assignment plan very much like the one presently before this Court. The plan at issue in Brewer allowed students to transfer from their neighborhood schools under strict conditions:

> [O]nly minority pupils are allowed to transfer from "predominantly minority city schools" to participating suburban schools, and non-minority students may transfer from suburban schools to city schools provided that their transfers "do not negatively affect the racial balance of the receiving school."

Id. at 742. The Second Circuit found that the plaintiff parents were not likely to succeed in their challenge to these race-based restrictions on transfers.

The Brewer court relied on the "Andrew Jackson cases," in which the Second Circuit held that a school district may take affirmative steps to combat de facto racial imbalance, even though such steps are not constitutionally required. See Parent Ass'n of Andrew Jackson High School v. Ambach (hereinafter "Andrew Jackson I"), 598 F.2d 705, 713-14 (2d Cir. 1979); see also Andrew Jackson II, 738 F.2d at 581 n.9. Like Brewer, the Andrew Jackson cases dealt with integration plans restricting the availability of student transfers that exacerbated conditions of racial imbalance. Specifically, the New York City school district implemented a "Controlled Rate of Change" scheme designed to reduce racial imbalance at the predominantly minority Andrew Jackson High School in Queens. Minority students in the school's attendance zones were given the opportunity to attend any high school in New York City whose student body was more than 50% white. Andrew Jackson I, 598 F.2d at 710-11.

There was a further restriction due to the district's concern that these transfers might trigger "white flight"; minority students could not transfer to schools in such numbers as to alter the racial balance by 4% or one fourth of the difference between the school's white enrollment and a 50% white enrollment (whichever was less). Id. at 711-12.

The Andrew Jackson court, applying strict scrutiny, id. at 718, affirmed the Plan. It agreed that integration -- or "inhibiting the process of resegregation" -- was in itself an end sufficient to justify the racial classification. Id. at 718 (citing Otero v. New York City Housing Auth., 484 F.2d 1122, 1140 (2d Cir. 1973) (affirming a housing authority's ability to limit the availability of units to would-be tenants based on their race, "where it can show that such action is essential to promote a racially balanced community")).[95]

As I explained above, the defendants in the present case offered substantial expert testimony as to the educational benefits that obtain from reducing minority isolation and de facto segregation in public schools. In this respect I predicate my conclusion, that reducing minority isolation is indeed a compelling interest that can justify race-conscious student assignment, on a record far more developed than the district and appeals courts had before them in the Andrew Jackson cases, or in Brewer.

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[95] The Andrew Jackson court remanded for further development of the issue of narrow tailoring; the court was particularly interested in how the Board hit upon its 50% figure. Id. at 720. The school district justified that percentage to the trial court as a "tipping point" of a different kind than the defendants' proposed "critical mass" here. Their data suggested that fifty percent was the point beyond which a minority presence in the school triggered white flight to suburban school districts. The district court rejected this theory, on the ground that the data showed that in some schools white flight occurred at similar or even greater rates when minority enrollment reached the 60% or 70% level. Andrew Jackson II, 738 F.2d at 579-80.

The Second Circuit vacated and remanded the case once again. Its review of the 50% tipping point was not as exacting as the district court's. The Court of Appeals found it sufficient that the 50% tipping point produced the "most significant drop" in white enrollment and did not require the school district to show that 50% hosted the "only significant drop." Id. at 580.

(2) **Is the Lynn Plan Narrowly Tailored to this Compelling Interest?**

There is no doubt that Lynn's race-conscious restrictions on voluntary transfers actually reduce minority isolation. The evidence is uncontroverted -- and the logic unquestioned -- that Lynn's Plan, which forbids white students from transferring into and minority students from transferring out of schools regarded as "racially isolated." Arguably, since the Plan's attention to a student's race is strictly limited to contexts in which a proposed transfer would exacerbate an identified condition of racial isolation, it is by definition narrowly tailored to the Lynn Defendants' stated purpose of reducing racial isolation.

But that logic obviously cannot alone vindicate the Plan's use of race. Lynn has to justify the specific parameters it has settled upon, and whether there are race-neutral alternatives to their use. A broader view of racial isolation, for example, would justify the use of race more often. If, for example, Lynn narrowed the range of allowable deviation from districtwide percentages to 1%, a school would be "racially isolated" in the 2001-2002 school year if fewer than 57% of its students were minorities. More schools would fit the definition of racial isolation, and the race-conscious restrictions on transfers would trigger more often. If Lynn is to appeal to "reducing racial isolation" as a compelling government interest, it must answer, in the context of narrow tailoring, for its definition of what "racial isolation" is.

I conclude that Lynn's definition of racial isolation is appropriately calibrated. As the Second Circuit's review of the school district's 50% tipping point marker in Andrew Jackson II illustrates, this is an inexact science. A race-conscious recourse must be minimally intrusive, but it must also have enough force to effectuate its ends in a meaningful way, see Wessmann, 160 F.3d at 810 (Boudin, J., concurring). This is a difficult channel for a school district to navigate, and if a court gives too little leeway, strict scrutiny becomes what the Supreme Court never intended it to be -- "fatal in fact." See Adarand, 515 U.S. at 237 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1979) (Marshall, J., concurring)).

In this case Lynn's definition of racial isolation is narrowly drawn. First, if the goal is to prepare students to live in a multiracial world, it makes sense to begin with an environment reflective of that world, namely, the demographics of the City of Lynn. The measure of balance that Lynn has selected, as Dr. Orfield, an expert on desegregation planning, noted, was tied to the overall breakdowns within the district, and so typical of desegregation efforts. Cf. Belk v. Charlotte-Mecklenburg Bd. of Education, 269 F.3d 305, 319 (4th Cir. 2001) (observing that "the plus/minus fifteen percent variance is clearly within accepted standards, and provides a reasonable starting point in the unitary status determination"). Second, the demographics of Lynn's school-age children (42% white and 58% nonwhite) ensure that the most racially isolated schools in the district, Lynn Woods (25%), Sisson (27%), and Shoemaker (30%), have at least a "critical mass" of minority students. Third, the plan attempts to minimize racial imbalance and isolation while preserving neighborhood schools and eschewing forced busing.

(3) Race-Neutral Alternatives are not Feasible

The plaintiffs maintain that, even if (as I have concluded) an improved racial balance in Lynn's schools is crucial to Lynn's educational goals, there were race-neutral methods of assignment that could have been adequate.

McArdle's analysis of residential patterns in Lynn suggests that residential segregation is deepening. She described a community with neighborhoods that are growing increasingly segregated by race -- in her expert opinion, that would not change in the next five to ten years. McArdle and Drs. Dovidio, Killen, and Orfield all predicted that Lynn's schools would become more and more racially identifiable if students were allowed to attend only their neighborhood schools. In fact, McArdle gave evidence that, if school attendance zones were to remain intact, a neighborhood-only plan would reduce the minority population of Lynn Woods from 24% to 8%, Shoemaker from 30% to 18%, and Aborn from 34% to 12%. Conversely, minority populations would increase at Cobbet, from 80 to 85%, and at Connery, from 80 to 83%.

Dr. Rossell's rebuttal was curious. She suggested that the school could redraw the neighborhood attendance zones to maximize integration. To be sure, Dr. Rossell did not bother to verify the feasibility of this alternative against the particulars of Lynn's geographical residential patterns.[96] Moreover, she conceded that, as McArdle described, there is a large "separate and physically distinct" portion of northeastern Lynn that is predominantly white, but she could not explain how attendance zones would be drawn to integrate neighborhood schools given this geographic dispersion.[97] Indeed, Superintendent Kostan, with far

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> Q. Did you perform any evaluation or study of the geographic locations of schools and each of their attendance zones to come to the conclusion that, in fact, they could move attendance zones and would be able to integrate their schools similar to what they currently have in their schools?
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> A. I haven't done that particular analysis of Lynn, but I have designed many desegregation plans, and I know it can be done.

[97] Dr. Rossell's conclusion seemed to be predicated in part on a different standard of what was an acceptable amount of integration -- that is, her view that there is no "critical mass" that marks a significant upturn in the benefits obtained from intergroup contact:

> Q. So, it's your testimony that the Aborn school . . . which is currently at 34% minority, and would become 12% minority, would continue to be a racially

greater experience in Lynn, predicted that "even if we redistricted, you still would have predominantly . . . minority schools and predominantly racially isolated white schools."

While I agree with Dr. Rossell that it may always be possible in theory to craft attendance zones so that they draw equally from geographically separate racial enclaves, at a certain point they would be "neighborhood schools" in name only. Students would be required to travel considerable distances to attend schools that are suddenly, by the fiction of redistricting, announced to be in their "neighborhood." Students in the city's minority core would be obliged to go to school in the overwhelmingly white northeastern region of Lynn (and vice versa). In fact, it is hard to imagine how, given Lynn's existing pattern of residential segregation, the district could redraw its neighborhoods to desegregative effect without compromising the integrity of the neighborhood-school principle and, worse yet, initiating forced busing.[98]

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integrated school under your definition?

A. Twelve percent is racially diverse, yes.

Emphasis added.

[98] The present location of Lynn's schools would make a redrawing of neighborhoods -- even so minimally as to achieve the limited integration that the Lynn Plan effectuates -- a race-neutral cover for forced busing. Earlier in this decision I raised hypothetically the prospect of a district locating schools between or on the borders of racially identifiable neighborhoods. This approach would be less intrusive than would be a redrawing of neighborhoods to shape the populations of schools where they are presently placed. It might well be the most desirable means to achieve racial balance,

In contrast, the Lynn Plan, which guarantees a student's admission to a "true" neighborhood school and affords additional options subject to overt racial restrictions, is more flexible and less restrictive than would be a race-motivated redrawing of neighborhoods.

Dr. Rossell also suggested that Lynn could create real magnet programs that would draw white students voluntarily from their predominantly white neighborhood schools into minority identifiable schools, and vice versa. Again, however, Superintendent Kostan, citing data culled by Lynn's PIC on trends in transfer requests, and Lynn's past experience, testified that a pure choice plan would result in resegregation: "trends would indicate that if you implemented a plan such as that, you probably would find that minority students would gravitate to racially isolated minority schools and white students would gravitate to racially isolated white schools." And in fact. Lynn tried, without success, in the 1980s to draw white students into a magnet school in a minority neighborhood.

Studies by the Lynn PIC of parent preferences in Lynn show that minority parents favor schools in minority-dominated areas

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but the Constitution takes note of practicality. The alternative must be economically feasible, see Wygant, 476 U.S. at 280 n.6 (finding race-neutral alternatives relevant if they achieve the stated end "about as well and at tolerable administrative expense"). The periodic demolition, relocation, and reconstruction of schools in response to changes in residential patterns is a far from viable alternative.

and white parents prefer schools in white areas. Parents tend to seek transfers to neighborhood schools contiguous to their own, as opposed to schools across town, with the result that -- regardless of whether they intend to self-segregate -- they choose schools in their own racial enclaves. Lynn school official and PIC director Janet Birchenough observed that white parents request 500 to 800 segregative transfers in a given year under the current Plan; all of these would have to be approved under a free-choice plan. Given the likelihood that free choice would result in still more requests for segregative transfers than are made presently (as the deterrent restrictions on such transfers would have been eliminated), it is difficult to see how a comparable measure of desegregation can be achieved this way.

Birchenough testified that Lynn has also considered school assignment by lottery. A lottery would randomly arrange students on a list; the school would make its assignments by proceeding down the list, accepting every parent's first school choice, unless the favored school was already filled. In that case the student would be assigned to his second choice, and so on. This policy suffers from the same flawed underpinnings: the PIC has documented trends showing that white parents tend to choose schools that are predominantly white, and nonwhite parents favor predominantly nonwhite schools.

In fact, even to the extent that white and nonwhite students would seek transfers to the same school, resort to a lottery system would not result in an integrated population at that school. The PIC's data demonstrate that under the current Plan white parents tend to bid for transfers much earlier in the year than do minority parents. Minority parents move into and between locations in the city more often, due to their comparative socioeconomic disadvantage. They are often not in a position to consider their children's school options in March and April and May, when white parents typically register their children. Most minority registrations occur later in the year, particularly on the cusp of the school year in August and September.

According to Birchenough, the district could not feasibly hold a single end-of-summer lottery to determine school assignments for the entire district in order to accommodate minority parents. In order to make appropriate staff assignments and resource allocations, the district must have some measure of notice of what schools its students will be attending. Conversely, a monthly lottery system that slotted students beginning in March would be workable, but it would effectively result in white students obtaining their first choice placements before minority students even articulate their preferences. If there are schools that white and nonwhite students both want to attend, the monthly lottery system would ensure that these schools remained predominantly white.[99]

c. Interest (5): "Providing an Education to All Students that Satisfies Federal and State Constitutional Requirements"

(1) The Command and Promise of Brown v. Board of Education

The Lynn defendants argue that the Plan "serves the compelling state interest in voluntarily achieving the 'clear command' of *Brown v. Board of Education*." While I conclude that the defendants are wrong to suggest that the Lynn Plan is *compelled* by *Brown*, since there is no evidence of ongoing *de jure* segregation, they surely have an interest in fulfilling the *promise* of *Brown*. For nearly fifty years, courts have recognized that eliminating school segregation -- whatever its cause -- is a proper and compelling governmental objective. While the courts in recent years have imposed more demanding requirements on the means to achieve integration, they have never repudiated the goal.

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[99] There is a rough correlation between socioeconomic status and race in Lynn: the wealthier areas of the city are predominantly white, and the poorer areas tend to be minority dominated. Lynn's PIC has studied the possibility of using this correlation to foster racial integration in a race-neutral way. Birchenough testified on the feasibility of a school assignment plan, facially race-neutral, that would make the ability to transfer contingent on one's socioeconomic status. This use of socioeconomic status as a "cover" for race, the PIC concluded, would not ameliorate *de facto* segregation in Lynn. The white students who live in poor, largely nonwhite neighborhoods typically have the same socioeconomic status as their nonwhite neighbors. These white students would be eligible to transfer out of their predominantly minority schools into white schools, thereby exacerbating racial imbalance.

If the only result of a socioeconomic approach is socioeconomic desegregation, the approach is not helpful in addressing issues of race. Dr. Orfield testified that "you can't really learn about racial differences just by socioeconomic desegregation if it does not produce racial desegregation."

Clearly, there was a period in time -- during the 1970s and 1980s -- when Lynn was vulnerable to a suit challenging the acts of school officials who knowingly exacerbated racial segregation within the district. But that moment passed, headed off by the very Plan in contention here. To be sure, it cannot be credibly suggested that this Plan in 2003 is narrowly focused on remedying the effects of 1980s discrimination.[100] The focus has to be in the present. And today, if Lynn eliminated the Plan, school segregation would follow directly on the heels of residential segregation. While Lynn contends that lifting the Plan's restrictions, with knowledge of what would follow, would expose them to a charge of discrimination, see, e.g., Diaz v. San Jose Unified School Dist., 733 F.2d 660, 670-71 (9th Cir. 1984); NAACP v. Lansing Bd. of Education, 559 F.2d 1042, 1051 (6th Cir. 1977), it overstates its exposure under current case law. Brown appeared to suggest that, whatever its cause, segregation in schools results in unequal educational opportunities that violate the Constitution. See Brown, 347 U.S. at 494 (noting that segregation is generally detrimental although the impact is "greater when it has the sanction of the law" (emphasis added)). However, in the years since Brown, it is clear that inequality born of residential segregation -- the choices of citizens, and not government -- is unlikely to expose the Lynn defendants, as they contend, to legal attack under the Equal Protection Clause. In short, Brown does not command school systems to redress de facto segregation. See Freeman, 503 U.S. at 495.

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[100] Indeed, to conclude that Lynn must continue to maintain a race-conscious school assignment plan in order to eradicate the segregative effect of transfer practices abandoned fifteen years ago -- when Lynn was a predominantly white community -- would require me to ignore the testimony of the defendants' own demographics expert, Nancy McArdle. As I explain above, McArdle ably demonstrated that residential segregation in Lynn is severe enough that the Lynn Plan is necessary to forestall de facto segregation that would necessarily follow from a strict neighborhood attendance zone plan. It is inferable from parents' tendencies to self-sort into neighborhoods by race that, given an open transfer program that accommodated segregative and desegregative transfers alike, the lion's share of transfers sought would be segregative. The evidence clearly establishes a risk of reversion to segregation, but of a de facto nature. Conversely, I have no factual or expert testimony before me to suggest that there are still lingering effects of Lynn's de jure practices to redress.

Nevertheless, in recognizing the consequences of de facto segregation, Brown and its progeny, quite apart from their mandatory elements, also have a powerful hortatory significance aimed at eventually uprooting school segregation "root and branch." Green v. Cty. School Bd., 391 U.S. 430, 437-38 (1968). In pursuit of the promise of integration, the Supreme Court has repeatedly affirmed in principle voluntary desegregation policies adopted by school districts to foster, preserve, and operate "unitary" school systems. See, e.g., Busstop, Inc. v. Bd. of Education of the City of Los Angeles, 439 U.S. 1380, 1383 (1978) (Rehnquist, J.) (expressing "very little doubt" that states can order desegregation beyond what the Constitution requires); Swann, 402 U.S. at 45. Even Justice Powell, author of the Bakke plurality opinion, endorsed a state's voluntary desegregation statute as "the sort of effort that should be considered by state and local officials and elected bodies." Columbus Bd. of Education v. Penick, 443 U.S. 449, 488-89 n.7. (1979) (Powell, J., dissenting).[101]

As Justice Marshall pointedly observed:

> The real irony of the argument urging mandatory, formal findings of discrimination lies in its complete disregard for a longstanding goal of civil rights reform, that of integrating schools without taking every school system to court. . . . It would defy equity to penalize those who achieve harmony from discord, as it would defy wisdom to impose on society the needless cost of superfluous litigation. . . . [F]ormal findings of past discrimination are not a necessary predicate to the adoption of affirmative action policies, and the scope of such policies need not be limited to remedying specific instances of identifiable discrimination.

Wygant, 476 U.S. at 305 (Marshall, J., dissenting).

To say that school officials in the K-12 grades, acting in good faith, cannot take steps to remedy the extraordinary problems of de facto segregation and promote multiracial learning, is to go further than ever before to disappoint the promise of Brown. It is to admit that in 2003, resegregation of the schools is a tolerable result, as if the only problems Brown addressed were bad people and not bad impacts. Nothing in the case law requires that result.

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[101] Notably, the Supreme Court has never even suggested that a voluntarily-adopted forced busing plan would be illegal.

(2) State Constitutional Requirements

Defendants also argue that state law requirements justify the Plan. As a general matter, I do not agree that a state constitutional requirement is a *per se* compelling interest in the Equal Protection analysis. The Fourteenth Amendment specifically empowers the federal government to act against discriminatory government actions at the state and local level, particularly those made on the basis of race. *See, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948) ("The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color."). An interest therefore cannot rise to the level of "compelling" solely because it is enshrined in a state's constitution.[102] Something more is required -- something about the principle reflected in the state constitution that either comports with federal principles or offers greater protection than the federal law.

The principle articulated here is that under Part 2, Chapter 5, § 2 of the Massachusetts Constitution, every resident of the Commonwealth is to be guaranteed an "adequate" education. McDuffy v. Sec'y of Exec. Office of Education, 415 Mass. 545, 617 (1993) ("It is clear that [the Massachusetts Constitution] obligates the Commonwealth to educate all its children." (emphasis in original)). To the extent that the adequacy requirement bears on the overall quality of education made available, this "compelling interest" folds into the analysis I have already done in Section V.B.4.a, supra: The Lynn Plan is narrowly tailored to the compelling interests of cultivating racial diversity and reducing minority isolation in amounts sufficient to create an atmosphere of racial tolerance in Lynn's schools and prepare Lynn's students to live in a multicultural society. To the extent that the Massachusetts Supreme Judicial Court ("SJC") has found the adequacy requirement to command that schools offer equal resources to students, id., the "compelling interest" of state constitutional compliance on that score folds into my analysis of Lynn's interest in reducing de facto segregation, with all its burdensome consequences on nonwhite children, in Section V.B.4.b, supra.[103]

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[102] Federal courts have stricken state constitutional provisions under the Equal Protection Clause -- finding at least one not even to pass rational basis review. See, e.g., Romer v. Evans, 517 U.S. 620, 631-32 (1996) (invalidating a state constitutional provision that refused protected status to homosexuals).

C. Other Federal Claims

As I find that the Lynn Plan does not violate the Equal Protection Clause, I likewise conclude that the plaintiffs have not established their claims of unlawful racial discrimination under 42 U.S.C. §§ 1981 and 2000d or the derivative claims under 42 U.S.C. §§ 1985 and 1986.

1. Title VI

42 U.S.C. § 2000d (Title VI of the Civil Rights Act of 1964) forbids racial discrimination "under any program or activity receiving federal financial assistance." The plaintiffs' Title VI claims against the state defendants were earlier dismissed, Comfort, 131 F. Supp. 2d at 254, but the claims against the Lynn defendants remain. The plaintiffs identify no act of racial discrimination under Title VI other than the Lynn defendants' use

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[103] The compelling nature of Lynn's articulated educational interests, as well as the extent to which the Lynn Plan is narrowly tailored to them, are established above on the strength of evidence submitted regarding the city of Lynn and the state of its school system before and after the Plan's implementation. I am reluctant to leverage these very specific facts to conclude that the state's "adequacy" mandate is necessarily compelling in the abstract. As to Lynn, it is nonetheless clear on the record before me that the race-conscious elements of the Plan are crucial to its educational mission.

of race in student assignments, a practice that I found did not violate the Equal Protection Clause. Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001) (quoting Bakke, 438 U.S. at 287). The plaintiffs thus have not established a claim under Title VI.

2. 42 U.S.C. § 1981

Likewise unavailing are the plaintiffs' claims under § 1981, which, "like the Equal Protection Clause, can be violated only by purposeful discrimination." General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375, 391 (1982). Section 1981's ban on racial discrimination, when applied to state actors, is coextensive with the nondiscrimination principle in the Equal Protection Clause. Ohio Contractor's Ass'n v. Keip, 713 F.3d 167, 175 (6th Cir. 1983) (finding that a remedial program that did not violate the Equal Protection Clause of necessity did not violate § 1981); Mescall v. Burrus, 603 F.2d 1266, 1271 (7th Cir. 1979) ("The relationships of §§ 1981 and 1983 to the Fourteenth Amendment are so close and they are each so strongly under its influence that we believe the use of each section must be guided by the principles announced by the Supreme Court for application of the Fourteenth Amendment to discrimination cases.").

Accordingly, because the Lynn Plan does not violate the Equal Protection Clause, the plaintiffs have likewise failed to make out their claims under § 1981.[104]

Moreover, the discrimination shown must specifically impair one or more of the following rights:

> to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981. I already held, as to the Comfort plaintiffs, that Lynn's school assignment plan has no bearing upon any of the rights set forth in § 1981. Comfort, 131 F. Supp. 2d at 255 n.5.

3. 42 U.S.C. §§ 1985, 1986

42 U.S.C. § 1985(3) furnishes a cause of action against anyone who conspires to deprive citizens of their right to equal protection under the law. 42 U.S.C. § 1986 further authorizes suit against any person who fails to act to prevent a § 1985 violation. As the plaintiffs have not established any civil rights violation or any unrealized conspiracy on the part of the

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[104] This reading of § 1981 does not render it superfluous. The value added of the statute, over and above the Equal Protection Clause, is that it is binding on private as well as public actors.

defendants to commit such a violation, judgment must enter for the defendants on these claims as well.

D. Article 111 of the Massachusetts Declaration of Rights

Plaintiffs advance a pendent state law claim that the Lynn Plan violates Article 111 of the Amendments to the Massachusetts Declaration of Rights, which provides that "[n]o student shall be assigned to or denied admittance to a public school on the basis of race, color, national origin or creed." Mass. Const. amend. art. 111. Plaintiffs contend that when a child's option to attend a school other than his or her neighborhood school is limited in order to avoid fostering racial imbalance, he or she is illegally "denied admittance to a public school on the basis of race."

While this position has certain surface appeal, the plaintiffs' reading of Article 111 cannot stand up to historical and legal scrutiny against the backdrop of SJC's canons of state constitutional interpretation and the requirements of the United States Constitution. First, the Lynn Plan's modest limitations on the range of transfer options beyond neighborhood schools do not "deny admittance to a public School on the basis of race" in the meaning of Article 111, which was designed chiefly to limit forced busing and preserve neighborhood schools. Second, while no court has ever expressly interpreted Article 111, the SJC has consistently construed similarly worded statutes narrowly, holding that they do not categorically ban suspect classifications but rather merely subject them to strict scrutiny. Third, the broad reading of Article 111 that the plaintiffs propose, which would flatly prohibit any race-conscious assignment policies in the public schools, must be rejected because its validity under the United States Constitution and consistency with other provisions of the Declaration of Rights is highly doubtful. In short, it is no accident that Article 111 has coexisted peacefully for decades with race-conscious integration efforts in the state's public schools. The amendment poses no obstacle to the Lynn Plan.

1. Applicable Principles of Constitutional Interpretation

The SJC has outlined a series of considerations to guide judicial interpretation of the Massachusetts Constitution.

> In determining the meaning of a constitutional provision, we look to the language and structure of the provision, so that it is "construed so as to accomplish a reasonable result and to achieve its dominating purpose." We do so bearing in mind the Constitution was "written to be understood by the voters to whom it was submitted for approval. It is to be interpreted in the sense most obvious to the common intelligence. Its phrases are to be read and construed according to the familiar and approved usage of the language." The words of a constitutional provision "are to be given their natural and obvious sense

> according to common and approved usage at the time of its adoption."
>
> Moreover, the Constitution "is to be interpreted in the light of the conditions under which it and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy." . . .
>
> Lastly, the Constitution "is a statement of general principles and not a specification of details . . . It is to be interpreted as the Constitution of a State and not as a statute or ordinary piece of legislation. Its words must be given a construction adapted to carry into effect its purpose.

McDuffy v. Sec'y of the Executive Office of Education, 415 Mass. 545, 558-59 (1993) (citations omitted). In addition, "constitutional provisions must be construed together to make an harmonious frame of government." Opinion of the Justices, 303 Mass. 631, 640 (1939).

Finally, "[w]hen the validity of an act . . . is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." School Comm., 366 Mass. at 338) (Quirico, J., concurring). This "rule is a venerable one and is often repeated in opinions by courts throughout the United States." Id. at 339-40 (Tauro, J., concurring). It "evolved because of a judicial desire to preserve amicable relations with coordinate branches of government and to assure the fullest possible consideration of constitutional questions before decision." Id. at 345. The same logic would apply when, as with a statute, a proposed construction of a state constitutional provision provokes federal constitutional doubt.

2. **The Lynn Plan and the Purpose of Article 111**

The Lynn Plan does not conflict with the "natural and obvious" meaning or the "dominating purpose" of Article 111 because it neither "assigns" students nor "denies admittance" to them "on the basis of race." The Plan plainly has no effect on school assignments in the first instance; typically, as a default matter, a child in Lynn attends his or her neighborhood school. The Plan never, under any circumstances, denies admittance to a child's neighborhood school or compels a child to attend a more distant school.

The Plan does not entail rigid racial classifications -- e.g., all white students must transfer from a certain school, all black students may not transfer to a certain school. Every student may attend his or her neighborhood school. The Plan simply operates to define the range of elective attendance options open to each student in a way that avoids fostering racial imbalance and isolation. This governing principle --

desegregating the schools -- is in fact the only reason why transfers are permitted in the first place.

These are meaningful distinctions -- not mere sophistry -- that fully comport with the underlying purposes of Article 111. The legislative history of Article 111 clearly demonstrates that the "benefit it was expected to confer" was preservation of neighborhood schools, and the "evil which it was hoped to remedy" was the politically divisive resort to forced busing. Article 111 was adopted by joint sessions of the Massachusetts General Court in 1975 and 1977 and was approved by ballot measure in 1978. The House and Senate bills that became Article 111 were introduced by a group of legislators on behalf of the Massachusetts Citizens Against Forced Busing. See Mass. Sen. Jour. 52 (1975); Mass. H. Jour. 510 (1975); Mass H. Jour. 257, 565 A (1977). The constitutionally-required description of the proposed article in the 1978 Massachusetts Information for Voters[105] stated:

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[105] The Massachusetts Constitution requires that the Secretary of State publish and distribute to voters certain information regarding ballot questions, which includes:

> The full text of every measure to be submitted to the people, together with . . . a fair, concise summary of the measure as such summary will appear on the ballot [and] other information and arguments for and against the measure.

Mass Const. art. 48, General Provisions pt. IV, as amended by arts. 74 and 108. The SJC commonly uses the contents of Information for Voters to discern legislative intent. See e.g., Bates v. Director of Office of Campaign and Political Finance, 436 Mass. 155, 166 (2002); Commonwealth v. Colon-Cruz, 393

> A "YES VOTE" would guarantee the right of parents or guardians of school-age children to educate those children free from any arbitrary assignment by school authorities to schools outside the school district. Any public assignment to a school outside the school district, based on achieving any established racial quota-system or ethnic balance[,] would require the permission of the parent or guardian.

Massachusetts Information for Voters (1978).[106] Contemporaneous press accounts from each hurdle in the passage of Article 111 likewise emphasized its aims of preserving neighborhood schools and eliminating forced busing. See, e.g., Constitutional Convention Approves Antibusing Amendment as Filibuster Fails, Boston Globe, June 12, 1975, at 11 ("The joint House and Senate approved the anti-busing amendment to the Massachusetts Constitution . . . "); Legislature Talks Little but Enacts a Great Deal, Boston Globe, Sept. 8, 1977, at 3 ("A joint session of the Legislature, after moderate debate, approved an amendment to the state Constitution that would prohibit the busing of public school children to achieve racial balance."); Six Referendums Win -- Seventh Close, Boston Globe, Nov. 8, 1978, at 14 ("The proposal, which fosters the neighborhood school concept

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Mass. 150, 161 (1984).

[106] Significantly, this text both confirms the amendment's intended focus on neighborhood schools/busing and, with the "parental consent" exception language, further suggests that it was not intended as a blanket prohibition on race-conscious assignment policies.

and is regarded by many as being antibusing, was leading . . . in latest returns . . . .").

The Lynn Plan expressly preserves neighborhood schools while at the same time managing to ameliorate racial imbalance and isolation, all without resort to coercive school assignments or forced busing. It neither assigns students to distant schools nor denies admittance to neighborhood schools. At most, it sometimes may limit the range of available elective out-of-neighborhood transfers, not "on the basis of race," but in order to avoid creating racial isolation or imbalance. The Lynn Plan is thus consistent with both the letter and the spirit of Article 111, as broadly envisioned by the legislators who drafted it and the voters who ultimately enacted it.

3. SJC Interpretation of Similar Language

While the Lynn Plan is consistent even with the broad intentions of Article 111's proponents, SJC decisions interpreting similar statutory language suggest an even narrower construction under which suspect classifications in the schools are not prohibited categorically but rather are simply subject to strict scrutiny. The logical conclusion from this SJC reasoning is that Article 111 is simply an education-specific analog of more general constitutional provisions that guarantee equal rights and equal protection.

For example, in Attorney General v. Mass. Interscholastic Athletic Ass'n, Inc. ("MIAA"), 378 Mass. 342 (1979), the SJC held that an Association rule -- "No boy may play on a girls' team" -- ran afoul of both the Massachusetts Equal Rights Amendment and Chapter 76, § 5 of the Massachusetts General Laws, a statutory precursor of Article 111. Id. at 363. The Equal Rights Amendment, Mass. Const. pt. 1, art. 1 as amended by Mass. Const. amend. art. 106, provides broadly that "[e]quality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." At the time, Chapter 76, § 5 provided -- in language later mirrored in Article 111 -- that "No person shall be excluded from or discriminated against in admission to a public school of any town, or in obtaining the advantages, privileges and courses of study of such public school on account of race, color, sex, religion, or national origin." Notably, the SJC held that the "absolute bar on male participation" imposed by the Association rule was not categorically invalid but rather "prima facie invalid under ERA or our cognate statute, [Mass. Gen. Laws c. 76, § 5], barring sex discrimination in the educational sphere." MIAA, 378 Mass. at 353 (emphasis added). "[S]uch classifications," the SJC explained, "are not permissible unless they meet two conditions: they must 'further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose.'" Id. at 354 (internal citation omitted); see also Opinion of the Justices, 374 Mass. 836, 842 (1977) (holding that a proposed amendment to Mass. Gen. Laws c. 76, § 5 that would prohibit women from participation with men in contact sports would fail a strict scrutiny test and violate the states Equal Rights Amendment); Opinion of the Justices, 373 Mass. 883, 888 (1977) (holding that a proposed statutory exclusion of Lowell's "Girl Officers Regiment" would fail constitutional scrutiny and violate the Equal Rights Amendment).

In other words, notwithstanding the apparent language of absolute prohibition in Chapter 76, § 5, the legality of suspect classifications in educational programs under the statute simply boils down to a strict scrutiny test. The SJC treated Chapter 76, § 5 as a specific statutory embodiment of constitutional equal protection principles for the education sphere -- a "cognate statute" -- and nothing more. The obvious conclusion is that nearly identical language concerning school assignment in Article 111 likewise boils down to a strict scrutiny equal protection test, a cognate constitutional provision enshrining the general principle of equality in the particular realm of public education.[107]

As I have explained in Section V.B.4, supra, the Lynn Plan is a narrowly tailored measure aimed at promoting compelling governmental interests. It therefore comports with the requirements of Article 111, as the SJC has construed similar language.

4. State Constitutional Harmony and Federal Constitutional Doubt

The SJC's consistent view that various anti-discrimination and equal protection laws boil down to a "strict scrutiny" test -- even where language might suggest absolute prohibition of suspect classifications -- is not surprising when viewed in historical context. Indeed, the plaintiff's proposed broader reading of Article 111 would conflict with other parts of the Massachusetts Constitution and would provoke serious doubt as to its validity under the United States Constitution. In contrast, a construction of Article 111 that applies strict scrutiny, rather than categorically prohibit the use of race, avoids these constitutional tensions.

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[107] The long-term historical coexistence of anti-discrimination provisions of the state constitution and various statutes with race-conscious school assignment programs further reflects the lack of inherent conflict between the two.

As yet another example, the 1972 Fair Educational Practices statute, Mass. Gen. Laws ch. 151C, § 2 -- which provides, "it shall be an unfair educational practice for an educational institution . . . [t]o exclude or limit or otherwise discriminate against any United States citizen or citizens seeking admission as students to such institution because of race, religion, creed, color, or national origin" -- has never been held to prohibit any public or private institution's affirmative action program.

The Massachusetts Department of Education's current Equal Opportunity regulations expressly recognize the compatibility of nondiscrimination principles and racial balancing. They provide, consistently with Article 111, that "[a]ll public schools in the Commonwealth shall admit students without regard to race, color, sex, religion, national origin, or sexual orientation." Mass. Regs. Code tit. 603, § 26.02(1) (cited locally as 603 CMR 26.02(1)). At the same time, they emphasize that "[n]othing in 603 CMR 26.00 shall control the interpretation of or interfere with the implementation of M.G.L. c. 71, § 37C [the Racial Imbalance Act] and related statutes, providing for the elimination of racial imbalance in the public schools." Id. § 26.02(6).

To accept the plaintiffs' argument that the Lynn Plan violates Article 111 would, without any directly applicable state precedent or judicial sanction, potentially upend a host of long-accepted state statutory and constitutional law and practice.

While the SJC has never expressly construed Article 111 itself, the court's analysis of other proposed anti-busing measures is revealing. In 1973, for example, the SJC rendered an advisory opinion that a bill entitled "An Act prohibiting transportation of pupils without the written consent of their parents or guardians" would violate both the federal and state constitutions.[108] Opinion of the Justices, 363 Mass. 899, 908 (1973).

First, the SJC explained, the anti-busing legislation would be invalid because it would categorically prohibit measures that might be required to remedy unconstitutional discrimination.

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[108] The bill provided, inter alia, that "[n]otwithstanding any law to the contrary, no child attending public school shall be transported to or from any public school without the prior written consent of his parent or legal guardian. Each of such children shall be permitted to attend the school nearest his residence within his city or town, which has a seat available in his grade, unless his attendance at another school has been requested by his parent or legal guardian." Opinion of the Justices, 363 Mass. 899, 842 (1973).

> In *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43 (1971), the [U.S.] Supreme Court struck down a statute prohibiting the involuntary busing of students to achieve racial balance in North Carolina Schools. In an unanimous opinion, Chief Justice Burger concluded that 'an absolute prohibition against transportation of students assigned on the basis of races, or for the purpose of creating a balance or ratio,'will similarly hamper the ability of local authorities to effectively remedy constitutional violations.' . . . [This bill] suffers from the same constitutional defect to the extent that its absolute prohibition against involuntary busing 'would inescapably operate to obstruct' remedies granted by Federal or State courts that have found de jure segregation.'

Id. at 901-02 (citations omitted). Significantly, the court found that an absolute ban on busing in Massachusetts would be invalid under *Swann* even though, at the time, no Court had ordered desegregation measures within the Commonwealth.[109] *See id.* (acknowledging "full awareness that there has been no holding by any court that de jure segregation exists in Massachusetts, nor has any State court been called upon to decide that question").[110]

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[109] *Morgan v. Hennigan*, 379 F. Supp. 410 (D. Mass. 1974), which did find *de jure* segregation in Boston, was still pending at the time.

[110] *Swann* also recognized the importance and value of race-conscious assignment policies in operating an integrated, or "unitary" school system. "[S]chool authorities have wide discretion in formulating school policy, and . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements. . . . [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system,

Second, the SJC held that the anti-busing bill would be unconstitutional under Reitman v. Mulkey, 387 U.S. 369 (1967), because it "serves to perpetuate existing segregation in some of the schools, regardless of its cause, and thus 'significantly encourage[s] and involve[s] the State' in racial discrimination." Opinion of the Justices, 363 Mass. at 902-03 (quoting Reitman, 387 U.S. at 381)).

> The facts of the Reitman case parallel the tortured history of our racial imbalance law. The California Legislature had enacted legislation which prohibited private racial discrimination in the sale or rental of private dwelling. In 1964, the California Constitution was amended by passage of Proposition 14, which gave every Californian the constitutional right to lease or sell his private dwelling to whomever he wanted. The California Supreme Court conceded that since there was no constitutional duty upon the State to end private housing discrimination the State could constitutionally repeal such legislation and retain a neutral stance toward such private discrimination. But the California Supreme Court held that Proposition 14 not only repealed pro tanto existing legislation prohibiting racial discrimination in housing, but also encouraged and significantly involved the State in private racial discrimination contrary to the Fourteenth Amendment by expressly sanctioning the private right to discriminate as a matter of State policy. In affirming the California Supreme Court's decision invalidating Proposition 14, the Supreme Court of the United States recognized that courts must assess the historical

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it must fall. . . ." 402 U.S. at 45.

> context, immediate objective, and "potential impact of official action in determining whether the State" has merely adopted a position of neutrality or one of encouragement of and involvement with private racial discrimination.
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> * * *
>
> This language suggests that even in situations where there is only de facto segregation, if the State adopts a policy which freezes these de facto conditions by imposing severe limitations on local school officials' discretionary authority to take effective remedial action, then the State policy constitutes State action serving to continue segregation in the schools and thus "significantly encourage[s] and involve[s] the state in private racial discrimination.
>
> * * *
>
> We conclude that this type of State-imposed limitation on a school authority's discretion not only "operates to inhibit or obstruct the operation of a unitary school system" but also uses State power to promote and entrench racial separation in all those schools whose communities have segregated residential patterns."

Id. at 903-06 (citations omitted); see also id. at 904-05 (citing Lee v. Nyquist, 318 F. Supp. 710, 712 (W.D.N.Y. 1970) (invalidating a section of state education codes that "prohibit[ed] state education officials and appointed school boards from assigning students, or establishing, reorganizing, or maintaining school districts, school zones or attendance units for the purpose of achieving racial equality in attendance")).

Third, and finally, the SJC held that the anti-busing bill "also violates arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. The guaranties contained in these articles are at least as great as those guaranties provided in the equal protection clause of the federal constitution." Opinion of the Justices, 363 Mass. at 908; see also generally Herbert P. Wilkins, Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution, 16 Suffolk L. Rev. 887 (1980) (noting the independent significance of the state constitution).

The SJC retread this ground in 1974, when it rendered an opinion that proposed legislation to bar the Boston School Committee "from assigning children to schools on the basis of race, sex, or creed without parental consent" was unconstitutional. Opinion of the Justices, 365 Mass. 648, 659-50, 652-03 (1974) ("[A]s a constitutional matter, the bill now before us is virtually indistinguishable from the bill we found to be unconstitutional in our earlier opinion. Each is unconstitutional on its face because it serves to perpetuate existing segregation in some of the schools, regardless of its cause, and thus 'significantly encourage[s] and involve[s] the State' in racial discrimination") (citations omitted). Later that year, the Court employed similar reasoning to find that amendments to the Racial Imbalance Act could not forestall the implementation of a desegregation plan in Springfield. See School Comm., 366 Mass. at 327-29 ("[A]ny action taken by the Legislature or by the school committee of Springfield which would tend to reverse or impede the progress toward the achievement of racial balance in Springfield's schools would constitute a violation of the Fourteenth Amendment to the United States Constitution and of arts. 1 and 10 of the Declaration of Rights of the Massachusetts Constitution. . . . [E]ven where steps toward desegregation are made voluntarily rather than pursuant to constitutional mandate[,] any subsequent State action which would cause a return of the preexisting segregation would itself be an act of de jure segregation.").

The constitutional objections to the 1970s anti-busing legislation outlined above would apply with even greater force to the plaintiffs' reading of Article 111 in this case as a sweeping prohibition on race-conscious assignment policies in the schools. I do not hold definitively that this reading of Article 111 violates the federal constitution -- the issue is not fully joined and there is no need for me to reach it. The point is that the plaintiff's position provokes grave constitutional doubt, the SJC has recognized the basis for that doubt, and the narrower "strict scrutiny" construction that the SJC has bestowed on language similar to Article 111 -- which poses no obstacle to the Lynn Plan -- would avoid those doubts.[111]

VI. CONCLUSION

This decision follows a very lengthy trial in which the defendants presented substantial evidence and data on the Lynn Plan and its ramifications. They did not seek to defend the Plan by referring to unsubstantiated generalizations about race relations, or the subjective perceptions of school officials. Nor did they rely on experts who knew everything about other systems in other parts of the country, but nothing about Lynn.

Rather, the defendants focused their attention, as they should, on this city, its school system, and the young children who attend it. They looked at it from the macro level -- census data, surveys, statistics, and from the micro level -- the heartfelt observations of the participants, children, teachers, administrators, parents.

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[111] With regard to the State Constitution, the SJC's determination that the anti-busing legislation violated Articles 1 and 10 of the Declaration of Rights would not necessarily preclude plaintiffs' reading of Article 111 because a subsequent amendment can repeal or curtail existing constitutional law. However, the canon of construing constitutional provisions "together to make a harmonious frame of government" supports a reading of Article 111 as an educational "cognate" of Articles 1 and 10 that simply subjects racial classifications in education to strict scrutiny.

The picture they painted not merely justified the Lynn plan as a constitutional matter. It celebrated the Plan and all the changes it has brought about in Lynn.

Nothing in the constitutional or statutory law of the United States or the Commonwealth of Massachusetts obliges me to dismantle the Lynn Plan and, in so doing, undermine defendants' commendable efforts to run a thriving, multiracial, and successful school system.

SO ORDERED.

Dated: June 6, 2003

/s/
NANCY GERTNER, U.S.D.J.

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U.S. District Court - Massachusetts (Boston)

CIVIL DOCKET FOR CASE #: 99-CV-11811

Comfort, et al v. Lynn School Comm., et al   Filed: 08/30/99
Assigned to: Judge Nancy Gertner   Jury demand: Defendant
Demand: $0,000   Nature of Suit: 440
Lead Docket: None   Jurisdiction: Federal Question
Dkt# in other court: None

SAMANTHA J. ON BEHALF OF HER   Chester Darling
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617-482-5300

RHONDA CAMPBELL   Chester Darling
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[term 01/24/01]   (See above)

KAREN AGNEW, on behalf of her   Chester Darling
minor child and next friend   [term 10/30/01]
Shavon Baskerville   (See above)
Plaintiff
[term 10/30/01]

ANDREW DIGAETANO, on behalf of   Chester Darling
his minor child and next   [term 01/24/01]
friend Andrew DiGaetano Jr.   (See above)
Plaintiff
[term 01/24/01]

CATTIBELL DIGAETANO, on behalf   Chester Darling
of her minor child and next   [term 01/24/01]
friend Andrew DiGaetano Jr.   (See above)
Plaintiff
[term 01/24/01]

JEAN O'NEIL, on behalf of her   Chester Darling
minor child and next friend   (See above)
Erin O'Neil and Patrick O'Neil
Plaintiff

WILLIAM O'NEIL, on behalf of his minor children and next friends, Erin O'Neil and Patrick O'Neil Plaintiff	Chester Darling (See above)
TODD BOLLEN, on behalf of his minor child Consolidated Plaintiff	Chester Darling (See above)
LAURIE BOLLEN, on behalf of her minor child Consolidated Plaintiff	Chester Darling (See above)
MATTHEW BOLLEN Consolidated Plaintiff	Chester Darling (See above)
JANEEN GOODWIN, on behalf of her minor child and next friend Consolidated Plaintiff	Chester Darling (See above)
SEAN GOODWIN Consolidated Plaintiff	Chester Darling (See above)
GINA LEONE, on behalf of her minor child and next friend Consolidated Plaintiff	Chester Darling (See above)
TROY LAMOTHE, JR. Consolidated Plaintiff	Chester Darling (See above)
LEANNE MANUEL Consolidated Plaintiff	Chester Darling (See above)
SHANICE MANUEL Consolidated Plaintiff	Chester Darling (See above)
MICHAEL STINSON, on behalf of his child and next friend Consolidated Plaintiff [term 10/11/01]	Chester Darling [term 10/11/01] (See above)
META STINSON, on behalf of her child and next friend Consolidated Plaintiff	Chester Darling (See above)
ANGELICA JACKSON	Chester Darling

Consolidated Plaintiff (See above)

KAREN TSALTAS, on behalf of her minor child and next friend Chester Darling (See above)
Consolidated Plaintiff

MICHAEL TSALTAS Chester Darling
Consolidated Plaintiff (See above)

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Defendant
John C. Mihos
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Defendant (See above)

Proceedings include all events.
1:99cv11811 Comfort, et al v. Lynn School Comm., et al
LEAD
George S. Markopoulos
(See above)

PATRICIA CAPANO John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

PATRICIA CAPANO John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

FRANK M. CARRABBA John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

FRANK M. CARRABBA John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

STEVEN F. DUFFY John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

STEVEN F. DUFFY John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

GEORGE MAZAREAS John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

GEORGE MAZAREAS John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

WILLIAM MCDONALD John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

WILLIAM MCDONALD John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

TIMOTHY MCMANUS John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

TIMOTHY MCMANUS John C. Mihos
Defendant (See above)

John C. Mihos
(See above)

Proceedings include all events.
1:99cv11811 Comfort, et al v. Lynn School Comm., et al
LEAD
Defendant (See above)

John C. Mihos
(See above)

Proceedings include all events.
1:99cv11811 Comfort, et al v. Lynn School Comm., et al
LEAD
Defendant (See above)

John C. Mihos
(See above)

COMMONWEALTH OF MASSACHUSETTS Richard W. Cole
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John R. Hitt

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COMMONWEALTH OF MASSACHUSETTS Richard W. Cole
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MADELYN DAY BARRY, as school committee member — John C. Mihos (See above)
Consolidated Defendant

DONNA COPPOLA, as school committee member — John C. Mihos (See above)
Consolidated Defendant

CAROLYN MURPHY, as school committee member — John C. Mihos (See above)
Consolidated Defendant

LORETTA CUFFE O'DONNELL, as school committee member — John C. Mihos (See above)
Consolidated Defendant

JAMES PEYSER, as Chairman of the Board of Education — Ranjana A. Chand Burke
Consolidated Defendant
Attorney General's Office
200 Portland Street
Boston, MA 02114
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ROBERTA SCHAEFER, as Vice Chairperson of the Board of Education — Ranjana A. Chand Burke (See above)
Consolidated Defendant

Proceedings include all events.
1:99cv11811 Comfort, et al v. Lynn School Comm., et al
LEAD
Consolidated Defendant

PATRICIA A. CRUTCHFIELD, as a member of the Board of Education — John C. Mihos (See above)
Consolidated Defendant

EDWIN J. DELATTRE, as a member of the Board of Education — John C. Mihos (See above)
Consolidated Defendant

WILLIAM K. IRWIN, JR., as a member of the Board of Education — Ranjana A. Chand Burke (See above)
Consolidated Defendant

ABIGAIL THERNSTROM, as a member of the Board of Education — Ranjana A. Chand Burke (See above)
Consolidated Defendant

USA interested party	Ross Wiener U.S. Department of Justice Educational Opportunities Section 601 D. Street NW Suite 4300 Washington, DC 20530 202-514-3843
PAMELA FREEMAN, on behalf of her monor child and next friend, James Freeman Movant	Norman J. Chachkin NAACP Legal Defense & Educational Fund, Inc. 99 Hudson Street Suite 1600 New York, NY 10013 212-219-1900 Nadine M. Cohen Lawyers Committe for Civil Rights Under Law of the Boston Bar

Dennis D. Parker

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BARBARA MURKISON, on behalf of   Norman J. Chachkin
their monor children and next   (See above)
friends Tia Murkison,
Cassandra Murkison, and Jason
Murkison   Nadine M. Cohen
Movant   (See above)

BARBARA MURKISON, on behalf of   Norman J. Chachkin
their monor children and next   (See above)
friends Tia Murkison,
Cassandra Murkison, and Jason
Murkison   Nadine M. Cohen
Movant   (See above)

Dennis D. Parker
(See above)

ANTHONY MURKISON, on behalf of   Norman J. Chachkin
their monor children and next   (See above)
friends, Tia Murkison,
Cassandra Murkison, and Jason
Murkison   Nadine M. Cohen
Movant   (See above)

ANTHONY MURKISON, on behalf of   Norman J. Chachkin
their monor children and next   (See above)
friends, Tia Murkison,
Cassandra Murkison, and Jason
Murkison   Nadine M. Cohen
Movant   (See above)

Dennis D. Parker
(See above)

NORTHSHORE CHAPTER OF THE   Norman J. Chachkin
NATIONAL ASSOCIATION FOR THE   (See above)
ADVANCEMENT OF COLORED PEOPLE
Movant

Nadine M. Cohen
(See above)

NORTHSHORE CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
Movant

Norman J. Chachkin
(See above)

Nadine M. Cohen
(See above)

Dennis D. Parker
(See above)

THE LYNN SCHOOL COMMITTEE
Third-Party Plaintiff
[term 01/11/00]

John C. Mihos
[term 01/11/00]
7 Franklin Street
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617-581-5313

CITY OF LYNN, THE
Third-Party Plaintiff
[term 01/11/00]

George S. Markopoulos
[term 01/11/00]
City Solicitor's Office
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Lynn, MA 01901
781-598-4000

PATRICK J. MCMANUS
Third-Party Plaintiff
[term 01/11/00]

George S. Markopoulos
[term 01/11/00]
(See above)

PATRICIA CAPANO
Third-Party Plaintiff
[term 01/11/00]

John C. Mihos
[term 01/11/00]
(See above)

FRANK M. CARRABBA
Third-Party Plaintiff
[term 01/11/00]

John C. Mihos
[term 01/11/00]
(See above)

STEVEN F. DUFFY
Third-Party Plaintiff
[term 01/11/00]

John C. Mihos
[term 01/11/00]
(See above)

GEORGE MAZAREAS
Third-Party Plaintiff
[term 01/11/00]

John C. Mihos
[term 01/11/00]
(See above)

Proceedings include all events.
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LEAD
[term 01/11/00] (See above)

TIMOTHY MCMANUS John C. Mihos
Third-Party Plaintiff [term 01/11/00]
[term 01/11/00] (See above)

JAMES MAZAREAS John C. Mihos
Third-Party Plaintiff [term 01/11/00]
[term 01/11/00] (See above)

COMMONWEALTH OF MASSACHUSETTS John R. Hitt
Third-Party Defendant [term 01/11/00]
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